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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition For Certiorari Filed July 31, 1967

Certiorari Granted October 9, 1967

IN THE

Supreme Court of the United States

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

AVCO CORPORATION,
vs.
AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.
} Civil No. 4272

APPEARANCES:

For the Complainant-Plaintiff:

William Waller, Esq.
Robert G. McCullough, Esq.
1200 American Trust Building
Nashville, Tennessee 37201

Don Banta, Esq.
105 West Adams Street
Chicago, Illinois 60603

For the Defendants:

Cecil D. Branstetter, Esq.
Carrol D. Kilgore
216 Third Avenue, North
Nashville, Tennessee

RELEVANT DOCKET ENTRIES

Date

11- 5-65 Petition for removal, removal bond, copies of pleadings and notices to Clerk and Master of

the Chancery Court for Davidson County, Tennessee and complainant's attorneys, filed.

11-12-65 Defendants' motion to dissolve temporary injunction and to dismiss filed.

11-18-65 Plaintiff's motion to remand filed.

2- 2-66 Defendants' motion to amend previous motion filed.

3- 2-66 Order of court entered denying plaintiff's motion to remand and defendants' motion to dismiss and sustaining defendants' motion to dissolve injunction.

3- 8-66 Plaintiff's motion for reconsideration with Exhibit A attached filed.

3-23-66 Order of court entered denying plaintiff's motion for reconsideration.

3-28-66 Notice of appeal from the orders entered March 2, 1966 and March 23, 1966 filed on behalf of plaintiff.

BILL OF COMPLAINT

(Filed October 15, 1965)

TO THE HONORABLE CHANCELLORS
HOLDING THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

* * (Rule No. 88288) * *

Avco Corporation,

Complainant,

vs.

Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, James F. Enoch, a

resident of Davidson County, Tennessee, individually and as Business Representative of Aero Lodge No. 735, C.H. Keen, a resident of Davidson County, Tennessee, individually and as President of Aero Lodge No. 735, R. E. Dearmon, a resident of Rutherford County, Tennessee, individually and as Vice President of Aero Lodge No. 735, J.W. Underwood, a resident of Davidson County, Tennessee, individually and as Recording Secretary of Aero Lodge No. 735; C. W. Warren, T. F. Jolly and W. B. Buttrey, residents of Davidson County, Tennessee, and H. R. Murray, a resident of Wilson County, Tennessee, individually and as members of the Plant Grievance Committee of Aero Lodge No. 735; James E. Sharer, a resident of Davidson County, Tennessee, and William T. Dunn, a resident of Cheatham County, Tennessee, individually and as representatives of the class composed of all members of all committees of Aero Lodge No. 735; Michael T. Allen, James M. Baker, Culley E. Barnhill, Thomas M. Bratcher, David O. Briley, Mary M. Brown, William K. Brown, Richard G. Buckner, Johnnie P. Charlton, Kathleen Daingerfield and Floda M. Davis, residents of Davidson County, Tennessee, individually and as members of Aero Lodge No. 735; and as representatives of the class engaged in the activities alleged herein,

Defendants.

Complainant, Avco Corporation, respectfully shows to the Court as follows:

I

Avco Corporation is a Delaware corporation duly qualified to do business in Tennessee. Defendant, Aero Lodge No. 735, International Association of Machinists and Aerospace Workers (hereinafter referred to as the "Local") is an unincorporated association with its principal office at

1003 South First Street, Nashville, Tennessee. It is a "labor organization" within the meaning of 29 USCA §152(5), and is the exclusive bargaining agent of all production and maintenance employees of complainant at its manufacturing plant in Nashville, Tennessee. The residences and capacities in which they are sued of the other parties defendant are as stated in the caption.

II

(a) Complainant operates a manufacturing plant in Nashville, Tennessee, employing approximately 3,000 workers, of whom approximately 2,000 are represented by defendant Local. At said plant, complainant is engaged in the business of manufacturing and assembling major component parts for certain types of aircraft as more fully described hereinbelow. A major portion of complainant's business is the manufacture and assembly of component parts for two types of troop carrier aircraft, the C-141 and C-130, both of which are utilized for the transport of troops and cargo and are used extensively by the armed forces of the United States in the conflict in Viet Nam. The particular parts manufactured are the wing-box beam assembly for the C-141 aircraft and the vertical and horizontal stabilizers for the C-130 aircraft. All such work is done by complainant under contract with Lockheed-Georgia Company which is the prime contractor with the United States Government for the manufacture of such aircraft.

(b) At said plant, complainant is also engaged in the manufacture of cabin roof and boom assemblies for the Bell UH1D Helicopter which is also used extensively by the armed forces in the conflict in Viet Nam. Such work is done by complainant under contract with Bell Helicopter Company, which is the prime contractor with the

United States Government for the manufacture of such helicopters.

(c) At said plant, complainant is also engaged in the manufacture of landing gear doors for the Grumman A6A, a fighter aircraft used by the United States Navy extensively in the conflict in Viet Nam. Such assemblies are manufactured by complainant under contract with Grumman Aviation Engineering Corp. which is the prime contractor with the United States Government for the manufacture of such aircraft.

(d) Complainant avers that its activities at said plant in the manufacture of the component parts for the aircraft described above are vital to the national defense of the United States, because such aircraft are presently being used in Viet Nam and also because such aircraft constitute vital weaponry in the United States defense establishment.

III

Defendant is the sole collective bargaining agent for all the production and maintenance employees of complainant in its manufacturing plant in Nashville, Tennessee, engaged as aforesaid in the production of materials essential to the national defense. Complainant and defendant Local are parties to a collective bargaining argreement dated June 21, 1965, a copy of which is attached hereto marked Exhibit A, but which need not be copied in the issuance of process. Complainant and defendant Local agreed in Article IX of said contract as follows:

> "Grievances are herein defined as any alleged violations of the terms of this Agreement or any difference of opinion arising as to its interpretation or application. Should any grievance, as defined herein, arise,

there shall be no suspension of work and an earnest effort shall be made to settle such difficulties promptly in the matter hereinafter outlined."

Said Article IX then provides in explicit detail the manner and method in settling grievances, including a provision for binding arbitration, if necessary. Certain other provisions of said collective bargaining agreement may be pertinent to the allegations herein, and reference is made to said Exhibit A for a complete statement of said Agreement.

IV

Shortly after the effective date of said collective bargaining agreement, Exhibit A hereto, members of the defendant Local, despite the provision of such contract quoted above, and in violation thereof, began to engage in a series of slowdowns and work stoppages to the detriment of complainant. Complainant alleges that such violations of said collective bargaining agreement began on about July 29, 1965, when approximately ten employees in the department manufacturing the Grumman door assembly engaged in a work stoppage. On information and belief, this was because of their dissatisfaction with a reprimand given an employee, even though such dissatisfaction, if any, was under the Agreement a matter for the grievance and arbitration procedure. Thereafter on August 3, 1965, six employees working in the machine shop walked off the job. On information and belief, this was in protest of complainant's use of tests for determining the eligibility of employees for promotion. Thereafter, on or about August 11, 1965, approximately 50 employees walked off their jobs. On information and belief, this was in protest of complainant's termination of a probationary employee. On

August 12, 1965, numerous employees in the departments manufacturing the component parts for the C-141 and C-130 aircraft engaged in a work stoppage of approximately 20 minutes. On information and belief, this was in protest of the same alleged grievance which was the subject of the walk out on August 11. On October 7 and 11, a number of employees engaged in production of component parts for the Bell helicopter failed to report, and on October 12 walked off the job. On information and belief, this was in protest of a job classification dispute. On October 14, 1965, between the hours of approximately 12:30 and 3:00 P.M., approximately 100 employees working in the departments manufacturing component parts for the C-141 walked off their jobs. On information and belief, this was in protest of the presence of timestudy engineers in their work areas. At the time of the change of shifts at 4:00 P.M. on October 14, all or substantially all of said 100 employees massed at the gate and prevented, by persuasion, coercion, or otherwise, employees who were to begin their work at 4:00 P.M. from reporting to work. The series of work stoppages alleged as aforesaid culminated in a plant-wide strike of all or nearly all employees of complainant beginning at approximately 7:30 A.M. October 15, 1965. Complainant alleges that at 7:30 A.M. on October 15, a large group of employees were massed around the entrance and streets surrounding complainant's plant, obstructing and preventing by threat, coercion, or otherwise, employees reporting for work at 7:30 A.M. from entering complainant's premises. Complainant is not advised as to the exact number of employees so massed at said time but alleges on information and belief that approximately 800 employees were present. Each and every alleged grievance above

described should have been handled under the grievance procedure outlined in the collective bargaining agreement, and each suspension of work was in violation thereof.

V

Complainant alleges that officials of defendant Local, officers or committee men, were included in the groups of employees who engaged in said work stoppages as alleged hereinbefore on a majority of the occasions set forth above. Complainant alleges that in the walk outs on October 14 and October 15, officers, committee men and other officials of defendant Local were involved, and hence complainant alleges, on information and belief, that such work stoppages and strikes were sanctioned by defendant Local in violation of Article XIII of said collective bargaining agreement, which states: "During the life of this Agreement, no work stoppages, strikes or slow downs shall be caused or sanctioned by the Union and no lockouts shall be made by the Company." Complainant further alleges, on information and belief, that said work stoppages constituted concerted action on the part of defendants, and that complainant is entitled to an injunction against defendants and each of them, their members, associates, agents and confederates, from engaging or participating in or encouraging or persuading employees of complainant to engage in or participate in, during the term of said collective bargaining agreement, any suspension of work or any interruption of complainant's operations, and from acting individually, or in concert with others, to interfere with the normal conduct of complainant's business at its Nashville, Tennessee plant.

VI

THE PREMISES CONSIDERED, COMPLAINANT PRAYS:

1. That proper process issue and be served on the defendants, requiring them to appear and answer this bill at an early rule day, but not under oath, which is waived.

2. That a temporary injunction issue and be made permanent on the hearing enjoining the defendants and each of them, their members, associates, agents and confederates from engaging or participating in or encouraging or persuading employees of complainant to engage in or participate in, during the term of the collective bargaining agreement between complainant and defendant, Aero Lodge No. 735 of the International Association of Machinists and Aerospace Workers, effective June 21, 1965, and terminating June 20, 1968, any suspension of work or any interruption of complainant's operations, and from acting individually, or in concert with others, to interfere with the normal conduct of complainant's business at it plant at Nashville, Tennessee.

3. For general relief.

This is the first application for injunction in this cause.

Waller, Lansden & Dortch
By *Robert G. McCullough*
Solicitors for Complainant

We are surety for the costs of this cause not to exceed $250.

Waller, Lansden & Dortch
By *Robert G. McCullough*

STATE OF TENNESSEE }
COUNTY OF DAVIDSON } SS.

Byron L. Clark makes oath that he is Director of Industrial Relations of the complainant, Avco Corporation, that he has read the foregoing bill, and that the allegations thereof are true except those made on information and belief, and these he believes to be true.

/s/ *Byron L. Clark*

Subscribed and sworn to before me
this 15th day of October, 1965.

/s/ *Mary C. Parrish*
Notary Public

My commission expires: 7-26-67

FIAT

To the Clerk and Master:

File this bill, and upon the giving of a proper injunction bond in the amount of $10,000, issue the injunction prayed for therein.

This October 15, 1965.

/s/ *Alfred T. Adams*
Chancellor

PETITION FOR REMOVAL

[Caption Omitted]

(Filed November 5, 1965)

The petitioners, appearing for purposes of removal and for no other purpose, would show to the court:

1. Avco Corporation, a Delaware Corporation engaged in interstate commerce, filed a bill of complaint October 15, 1965, in the Chancery Court of Davidson County, Tennessee, against the defendants named in the caption of this petition, seeking temporary and permanent injunctions. A temporary injunction issued as prayed the same day. The case is docketed in that court as No. 88,288.

2. A copy of the original bill and a copy of the injunction are attached hereto.

3. The petitioners herein include all of the defendants named in the bill and subpoenas issued thereon.

4. The plaintiff is an employer whose employees are in an industry affecting interstate commerce, and whose activities affect interstate commerce.

5. The defendant, Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, is a labor organization in which employees participate and which exists for purposes including dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work, and it is the exclusive bargaining agent of all production and

maintenance employees of the plaintiff's manufacturing plant in Nashville, Tennessee. A collective bargaining contract is currently in force between the defendant Lodge and the plaintiff covering such employees.

6. The bill alleges as the basis of action that the defendants have conducted concerted work stoppages in violation of the "no-strike" clause of the contract.

7. This action is therefore a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Labor Management Relations Act § 301, 29 U.S.C. § 185, of which this court would have jurisdiction under that section without regard to the amount in controversy. It is also an action of a civil nature founded on a claim of right arising, if at all, under the laws of the United States, and may be removed to this court under the provisions of 28 U.S.C. § 1441(b) without regard to the citizenship of the parties.

8. This petition is filed within 20 days after defendants received copies of the bill and injunction, and it is accompanied by a bond with good and sufficient surety conditioned as required by 28 U.S.C. § 1446(d).

WHEREFORE, the petitioners pray that this case be removed to the United States District Court for the Middle District of Tennessee, Nashville Division.

/s/ *Cecil D. Branstetter*
Cecil D. Branstetter
Attorney for the Petitioners

[Affidavit and Bond Omitted].

MOTION

[Caption Omitted]

(Filed November 12, 1965)

Defendants move the Court to dissolve the temporary injunction issued in this case and to dismiss the case on the following grounds:

1. The complaint shows on its face that it involves and grows out of a labor dispute, that the temporary injunction sought and granted enjoins the acts enumerated in 29 U.S.C. § 104, or some of them, and because this Court is denied the power to issue and maintain such injunctions by the provisions of 29 U.S.C. § 101 and 104.

2. Because the complaint shows on its face that it involves and grows out of a labor dispute, because the temporary injunction issued enjoins acts described in U.S.C. § 104, and because the said temporary injunction, issued by a "Court of the United States" as defined by 29 U.S.C. § 113 (d) is illegal.

/s/ Cecil D. Branstetter
Attorney for Defendants

[Certificate of Service Omitted]

MOTION TO REMAND

[Caption Omitted]

(Filed November 18, 1965)

Avco Corporation, the complainant in the suit in the Chancery Court for Davidson County, Tennessee, Rule No. 88288, which has been removed to this Court, moves the Court for an order remanding the cause to said Chancery Court on the ground that the cause was improperly removed, and in support of this motion, respectfully shows as follows:

1. The suit is not, as alleged in the removal petition, founded on a claim arising under the laws of the United States, but instead is founded upon a claim of breach of contract arising under state law.

2. This Court, by virtue of 29 U.S. Code, sec. 104, has no jurisdiction of said suit.

Naphin, Sullivan & Banta
105 West Adams Street
Chicago, Illinois 60603

Waller, Lansden & Dortch
American Trust Building
Nashville, Tennessee 37201
By /s/ Robert G. McCullough
/s/ William Walker
Attorneys for Avco Corporation

[Certificate of Service Omitted]

MOTION TO AMEND PREVIOUS MOTION

[Caption Omitted]

(Filed February 2, 1966)

Come the defendants and respectfully move the Court to permit them to amend their motion to dissolve the temporary injunction and to dismiss the case previously filed in this cause by adding thereto, after Paragraph 2 thereof, the following:

> "In the event the Court determines not to dismiss the suit as previously asked in this motion, defendants respectfully move the Court to dissolve the injunction and dismiss the case or to stay further proceedings therein for failure of the plaintiff to pursue the remedy of arbitration for the alleged violation of the agreement, as provided for by Article IX of the Agreement attached to and incorporated in the original bill filed in the Davidson County Chancery Court (a copy of which agreement is also attached to and incorporated in this motion as Exhibit 'A')."

/s/ *Cecil D. Branstetter*
Cecil D. Branstetter
/s/ *Carrol D. Kilgore*
Carrol D. Kilgore
216 Third Avenue, North
Nashville, Tennessee

[Certificate of Service Omitted]

Portions, Collective Bargaining Agreement (Exhibit A to Defendants' Motion to Amend Their Motion to Dissolve the Injunction).

ARTICLE IX.

Section 1.

Grievances are herewith defined as any alleged violation of the terms of this Agreement or any difference of opinion

arising as to its interpretation or application. Should any grievance, as defined herein, arise there shall be no suspension of work and an earnest effort shall be made to settle difficulties promptly in the manner hereinafter outlined.

Step 1.

* * * * * * * *

Step 2.

* * * * * * * *

Written grievances relating to matters general in character may be submitted by the Union to the office of the Director of Industrial Relations not later than forty-eight (48) hours prior to the date of the next scheduled meeting. The Company may originate a grievance against the Union for discussion in such meeting and in such cases it shall advise the Union of the nature of the grievance forty-eight (48) hours prior to the date of the scheduled meeting. The Union will submit its answer to the Company's grievance within five (5) working days following the date of the meeting.

Step 3.

(a) Either party may refer a grievance to arbitration within five (5) working days after a written answer is received in Step 2, above, by notifying the other party that it desires the grievance to be arbitrated. The party referring the grievance to arbitration shall, within five (5) additional working days, request the Director of the Federal Mediation and Conciliation Service to appoint an arbitrator in accordance with the procedures set forth in Paragraph B, below.

* * * * * * * *

ORDER

[Caption Omitted]

(Entered March 2, 1966)

This action was instituted in the Chancery Court for Davidson County, Tennessee, and subsequently removed by the defendant to this court. The plaintiff has filed a motion to remand.

According to the complaint, the plaintiff Avco Corporation is a manufacturer of aero-space equipment and is engaged in interstate commerce. The defendant Aero Lodge No. 735, International Association of Machinists and Aero Space Workers (hereinafter referred to as "Aero Lodge") is an unincorporated labor organization and the exclusive bargaining agent of all production and maintenance employees at the plaintiff's Nashville plant. Plaintiff and defendant entered into a collective bargaining agreement June 21, 1965, containing a no-strike clause and providing that an explicit procedure, including binding arbitration, be followed to resolve grievances. Shortly after the agreement became effective, a labor dispute arose and members of Aero Lodge began to engage in a series of slowdowns and work stoppages culminating in a plant-wide strike. The complaint contains prayers for an injunction against work stoppages during the period of the collective bargaining agreement and for "general relief."

The removal statute, 28 U.S.C. § 1441, authorizes removal of an "action of which the district courts have original jurisdiction founded on a claim or right arising under the . . . laws of the United States. . . .". Avco Corporation asserts that this case does not come within the scope of this removal authorization because its claim does not arise under the laws of the United States and because Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, withdraws jurisdiction from this court to grant the injunctive relief sought in the complaint.

Although the Court of Appeals for the Third Circuit recently held otherwise,[1] this court is persuaded that all claims founded upon collective bargaining agreements in industries affecting interstate commerce arise under federal law. In *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), the Supreme Court held that Section 301 of the Taft-Hartley Act commissions the federal courts to fashion a body of federal substantive law to be applied in enforcing collective bargaining contracts. The Court reasoned that state law might provide illumination in the search for the best means to effectuate the federal policy, but said, at page 457, that "[a]ny state law applied . . . will be absorbed as federal law and will not be an independent source of private rights." In *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), the Court applied the doctrine of *Lincoln Mills* to state courts exercising concurrent jurisdiction in actions founded on col-

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[1] *American Dredging Co.* v. *Local 25, Marine Division, Int'l Union of Operating Eng'rs,* 338 F.2d 837 (3rd Cir. 1964), cert. denied, 380 U.S. 935 (1965). An excellent analysis of the decision appears in Note, 78 Harv. L. Rev. 1665 (1965).

lective bargaining agreements, and held that the state courts, like their federal counterparts, must use the federal substantive law developed under the implied mandate of Section 301. Thus, according to the doctrine of *Lincoln Mills* as expanded in *Lucas Flour Co.*, all rights and claims resulting from a collective bargaining agreement in an industry affecting interstate commerce arise under federal law; state law does not exist as an independent source of private rights in regard to collective bargaining contracts.

The plaintiff's second contention—that this court lacks jurisdiction because the complaint seeks injunctive relief—is likewise unsound. The Norris-LaGuardia Act withdraws jurisdiction from the federal courts to enjoin a peaceful strike growing out of a labor dispute,[2] even when the strike violates the terms of a collective bargaining contract. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). But the mere fact that a prohibited labor injunction is among the remedies sought does not mean that a district court lacks original jurisdiction over the cause of action for the purpose of awarding other relief. Thus, in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), the inclusion in the complaint of a prayer for a prohibited labor injunction, together with a prayer for damages, did not prevent the Supreme Court from remanding the case to the district court for the purpose of determining whether

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[2] Section 4 of the Norris-LaGuardia Act provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute * * *."

damages should be awarded.[3] It is clear on the authority of *Atkinson,* therefore, that a prayer for a prohibited injunction does not preclude a district court from exercising original jurisdiction, at least if non-injunctive relief is also sought.

In addition to the prayer for an injunction, the complaint herein contains a prayer for general relief. The effect of a similar general relief prayer was considered by the Supreme Court in the early case of *Watts* v. *Waddle,* 31 U.S. 389 (1832). The complaint in that case prayed for specific performance of the defendants' contract to purchase land, and in addition, for general relief. The Court held that, although the complainants were not entitled to the specific relief requested, the allegations in the complaint that the defendants had been in possession of the land involved in the controversy entitled the complainants to recover rents and profits under the prayer for general

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[3] The complaint in *Atkinson* contained three counts. Count I stated a cause of action for violation of a collective bargaining contract and prayed for damages from the union. Count II purported to invoke diversity jurisdiction and sought damages from individual members of the union. Count III stated the same cause of action as Count I but sought injunctive relief. Counts I and II were considered by the Court in *Atkinson* v. *Sinclair Refining Co.* and Count III was considered in *Sinclair Refining Co.* v. *Atkinson.* Lest it be thought that Count I and Count III stated separate causes of action so that *Atkinson* would not be controlling in this case, it should be noted that both counts were founded on the same alleged wrong, and a single wrong gives rise only to a single cause of action regardless of the fact that the complaint is fractured into multiple counts.

relief.[4] Likewise, the allegation of the complaint herein that the defendant breached its contract to submit grievances to arbitration and to refrain from striking provides a sufficient basis under the general relief prayer for awarding damages and, perhaps, for compelling specific performance of the arbitration provision.

Moreover, this case would be controlled by *Atkinson* even if the complaint did not contain the general relief prayer. Rule 53(c), Federal Rules of Civil Procedure, provides that "every final judgment shall grant the relief to which the party is entitled, even if the party has not

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[4] The Court stated:

"A new ground of relief has been assumed in the argument here that was not made in the Circuit Court, which is, that although this court should be of the opinion that a specific execution of the contract ought not to be decreed, still the complainants are entitled to a decree for the rents and profits of the land while it was in the possession of the defendants.

The defendants object to this relief, first, because the bill is not so framed as to embrace it * * *.

" * * * * *

"Although there is no specific prayer in the bill to be paid the rents and profits, yet the court thinks that, under the general prayer, this relief may be granted. Under this prayer, any relief may be given for which the basis is laid in the bill. In this case the possession of the land by the defendants is alleged, and the demand for rents and profits would result from this fact.

" * * * * *

"That part of the decree of the Circuit Court which refused a specific execution of the contract is affirmed; but in order to afford relief for the rents and profits, the decree dismissing the bill is opened and the cause remanded for further proceedings." (31 U.S. 389, at 402, 403)

demanded such relief in his pleadings." Thus, a prayer for an injunction constructively acts as a prayer for all appropriate relief.[5] See *Publishers Ass'n of N.Y. City* v. *New York City Newspaper P.P.U.*, 246 F.Supp. 293 (1965).

Upon consideration, therefore, the court is of the opinion that the plaintiff's claim arises under the laws of the United States and that the complaint states an "action of which the district courts have original jurisdiction." Accordingly, it is Ordered that the motion to remand be, and it hereby is, denied.

There remain to be considered defendants' motions to dissolve the injunction heretofore issued and to dismiss the action. On the basis of the court's reasoning and the authorities cited in connection with the motion to remand, the court is of the opinion that the motion to dissolve the injunction is well taken and that the motion to dismiss the action is not well taken.

Accordingly, it is Ordered that the motion to dismiss the action is denied, and it is further Ordered that the injunction heretofore issued be, and it hereby is, dissolved.

/s/ *Frank Gray, Jr.*
Frank Gray, Jr.
United States District Judge

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[5] While the Federal Rules of Civil Procedure do not expand the court's jurisdiction, they are determinative of the scope of relief which the court can award under a particular prayer.

MOTION FOR RECONSIDERATION

[Caption Omitted]

(Filed March 8, 1966)

Complainant, Avco Corporation, moves the Court to reconsider its order entered in this cause on March 2, 1966, on the following grounds: In acting on the second ground of the motion to remand, which involves a determination of the scope of permissible relief under the bill of complaint filed in the Tennessee Chancery Court, the Court should not assume its own jurisdiction in advance (the very point at issue) by applying federal procedure law in determining such scope, but should apply Tennessee law, under which no relief other than injunctive relief could be granted, notwithstanding the prayer for general relief. (See *Mengle Box Company* v. *Lauderdale County,* 144 Tenn. 266, and certified copy of the bill of complaint in said case, annexed hereto as Exhibit A). The complainant has, on brief and in oral argument, disclaimed (and now disclaims) reliance on federal law, either substantive or procedural.

Respectfully submitted,

Waller, Lansden & Dortch
American Trust Building
Nashville, Tennessee 37201

Naphin, Sullivan & Banta
105 West Adams Street
Chicago, Illinois 60603
By */s/William Waller*
/s/ Robert G. McCullough
Attorneys for Avco Corporation

[Certificate of Service Omitted]

EXHIBIT "A" TO MOTION FOR RECONSIDERATION

[Caption Omitted]

This is to certify that, I, Walter L. Jordan, am the Director of Archives for the State of Tennessee, and that as a regular part of my job, I keep the records filed in the Supreme Court of Tennessee. I further certify that attached hereto is a true and correct copy of the original Bill of Complaint filed in the Chancery Court at Ripley in and for Lauderdale County, Tennessee and that said Bill constituted a part of the record filed in the Supreme Court of Tennessee in the case Style Mengle Box Company v. Lauderdale County, 141 Tennessee 373.

Witness by my hand this 21st day of January, 1966.

/s/ *Walter L. Jordan*
Walter L. Jordan
Director of Archives
State of Tennessee

Sworn to and subscribed before me this 21st day of January, 1966.

/s/ *Adine Hurt, Notary Public*
My Commission expires: 7-22-67

TO THE HONORABLE V. H. HOLMES, CHANCELLOR ETC. PRESIDING AND HOLDING THE CHANCERY COURT AT RIPLEY IN AND FOR LAUDERDALE COUNTY TENNESSEE.

The Mengel Box Company, a corporation incorporated under the laws of New Jersey, but which has complied

with the Private Corporation Laws of the State of Tennessee and is legally doing business in the State of Tennessee, being engaged in the timber and lumber business and having a place of business in Lauderdale County, Tenn. COMPLAINANT.

vs.

The County of Lauderdale and W. C. Patton, Judge of the County Court of Lauderdale County, Tenn., who is its financial agent, W. G. Denny, N. W. Barbour, and C. W. Patton, Special Commissioners, all citizens and residents of Lauderdale County, Tennessee; and the Larimer & Burgett Bridge Company, a corporation incorporated under the laws of the State of Tennessee and having its principal place of business in Memphis, Shelby County, Tenn., but which has an agent now engaged in the bridge business in Lauderdale County, Tenn.

DEFENDANTS.

Your Complainant respectfully show unto Your Honor:

That it is the owner of a tract of 8760 acres of land, situated in the 9th civil district of Lauderdale County, Tenn., conveyed to it by the Anderson-Tully Company in 1916 and the same is bounded and described as follows:

> BEGINNING at the southeast corner of the tract of land heretofore conveyed by C. G. Bond and wife to the St. Louis Wooden Ware Works in the center of the old channel of the Forked Deer River; thence up the meanders of the said river in the center of the same, running out of said river at a point on the bank of the same West of the foot of Chisholm Lake three small cypress, one cypress marked XM; thence up the west bank of the said lake North 318 poles to a honey locust marked G and 318 poles at the west edge of said lake; thence in a northwesterly direction to the West

end of the West arm of said lake; thence around said arm and then with the north side of said arm East to a point in the center of the old channel of the Forked Deer River; thence up the center of said river with its meanders to a point on the West bank of said river, Henning's southwest corner, a black oak with red oak and two ash and two hackberry pointers; thence with Henning's line on the West side of the river in a northern direction to Henning's northwest corner a large cottonwood, ash and maple pointers; thence East with Henning's line 262 poles to the center of said river; thence up the center of said river to the cutoff; and up the center of the said cutoff to a point directly east of Rucker's northeast corner; thence west 150 poles to Ruckers northeast corner; thence South 100 poles along Ruckers east line to another corner of his; thence West 20 poles to another pointer; thence south 27 poles to his southeast corner; thence West with Rucker's south line 200 poles to Anderson's east line; thence south 125 poles to a point in Anderson's south line to a large sweetgum marked TW with a hole in the said gum at the ground on the north side and west of wood lake; thence west 478 poles to Pierson's northeast corner in Anderson's south line; thence south 326 poles to Pierson's southeast corner; thence West 151 poles to Pierson's southwest corner; thence south along the west line of Grant 11004 and 11000, 1746 poles to the BEGINNING. Being all of Grant 11004 and Grant 11000 except that part sold to Pierson, and part of Grant 11001, and the land conveyed to C. G. Bond by J. C. Marly Oct. 29, 1889, that being part of grants 11000 and 11003. And being the same tract of land conveyed by C. G. Bond and wife to Theodore and W. B. Tamm by deed of record in Deed Book Z at pages 201 et seq. and page 238-9 of the Register's Office at Ripley, Tenn.

Your complainant further shows that this land is in the Mississippi Bottom and lies north and west of the Forked Deer River and is now principally valuable for the merchantable timber on the same, but it is good farming land when cleared up and most of it is susceptible of cultivation. A great deal of land down in that section of the bottom especially west of this tract around Hales Point and Bar on the Mississippi River have already been cleared and are in cultivation and a great many people live down in that section of the country and farm said land. The principal railroad town and the one most accessible to these people and lands and especially the land of complainant is Ripley, Tenn., the county seat of Lauderdale County. For at least sixty or seventy years there has been a public road from the town of Ripley through the town of Arp and down across what is known as the Divide (being where the Forked Deer River forks, one prong running on South and the other running in a western direction and emptying into the Mississippi River) said road runs on down the north bank of this prong running West for about two miles and a half and forks there, one prong running on West to the town of Bar on the Mississippi river and the other running north or northwest to the town of Hales Point on the Mississippi, at the mouth of the Obion River. This public road is the only road for getting in and out from these two settlements on the Mississippi River and from complainant's land out to Ripley and the Illinois Central Railroad, and the same has been kept up and maintained by the county of Lauderdale and used as a public road by all people travelling in and out of that section of the country for at least sixty years. Several years ago the County of Lauderdale erected a steel bridge, something like two

hundred feet long across Forked Deer River at the Divide and just immediately north of where the River forks and where said road crossed said river, and since that time this bridge has been a part of said public road and has been in use by the public generally. Something like one-quarter of a mile west of this iron bridge Lauderdale County erected, several years ago, another iron bridge across a slough running from the north and emptying into Forked Deer River, which is called and known as the Wash Out in that section of the country, and this bridge was used by the travelling public as a part of said public road along the north bank of Forked Deer River until something like a year ago when one of the piers of the same was undermined by water and part of the bridge fell down and is now down in the bed of said slough, this falling down being due to the improper way of the construction of the said bridge by the defendant, the Larimer and Burgett Bridge Company. This bridge can be repaired and constructed so that it will be a permanent one and afford substantial and ample passage for the travelling public using that road over said slough at a cost of from $250.00 to $500.00, and when so repaired this public road will be best and most practicable route or location and the nearest route for the people living in that section of the country to and from the county seat at Ripley, Tenn. There is quite a large section of the country lying North and West of this Forked Deer River which this public road accommodates, being one of the civil districts, the 9th civil district of Lauderdale County, Tenn.

Your complainant shows further that at the July Term 1920 of the County Court of Lauderdale County, Tenn., the Quarterly Court of said County passed a resolution which

abandoned this public road from the South bank of Forked Deer River where the bridge now crosses it, from thence on across said River and down the north bank of the same for a distance of about two miles and a half, being about one-half a mile west of the West line of Your Complainant's tract of land, and ordered the said bridge which is now across said Forked Deer River to be taken down and moved and put across the south prong of the river a short distance south of the Divide and ordered the bridge which has fallen at the Wash Out to be removed and put across said River at a point two miles and a half or thereabout west of the Divide and where the public road now forks, one prong running to the Bar and the other to Hales Point; and ordered a new public road opened up along the south bank of the said river, so that instead of the present road crossing the river north of the Divide where the bridge now is it would cross the south prong of the river a short distance south of the Divide and run along the South bank of the said River and across the same North again where the road now forks going to the Bar and Hales Point. Your complainant shows unto Your Honor that it had no notice whatever that this change would be made or attempted by the said Quarterly Court and no notice was given to any of the other owners of land North and West of this Forked Deer River, especially the north prong of the same, but this action by the Quarterly Court was solicited and induced by parties who cared nothing for injuring and damaging the lands and property of your complainant and others living north and west of said Forked Deer River, but who had for their purpose the opening up of a public road at the place proposed in order that they might increase the value to their own lands lying between these two prongs of the river and make the same more accessible for travel to and from the same.

These people, or many of them directly interested in opening up this new road have a way of ingress and egress from the Ashport and Ripley public road north to their land by what is called the Falls. At any rate they should not want and should not be permitted to damage the lands of the complainant north and west of said Forked Deer River by removing this road and bridge in order to further their own selfish interest and increase the value of their lands.

Your complainant shows further that this bridge across the River where the public road now crosses north of the Divide is the only way of ingress and egress which it has to its lands from the County Seat or any other place in Lauderdale County Tenn., except a road many miles north thereof which runs out into the north end of Lauderdale County, but this road does not enter the tract of land of complainant described above. Complainant shows that if the County of Lauderdale or the defendants are permitted to take away the steel bridge where it now crosses said river north of the Divide and abandon said public road and move the bridge to the proposed point on the South Fork of said river and open up said road along the south bank of the same, that it will work an irreparable injury to your complainant and its land because it is not possible to cross said river without a bridge except to ford it at very low water which is dangerous and which cannot be done with vehicles or teams to any advantage. Complainant shows further that the public road now along the North banks of said river is in fairly good shape and can be put in first class shape and the bridge across the washout reconstructed at much less cost than to open up the road along the south bank of the said river and to

tear down and remove said bridges to the places proposed, and by doing so Lauderdale County and the taxpayers thereof will be saved anywhere from five to seven thousand dollars. Complainant shows further that the land along the north bank of said Forked Deer River lies better and is better suited for the public road to be on that side of the River than the land on the south side of the River, which does not lie so favorably for a road.

Complainant shows further that pursuant to said order of the Quarterly Court at its July Term 1920, the defendant W. C. Patton, County Judge of Lauderdale County, Tenn., who is its financial agent, appointed the defendant W. G. Dennie, N. W. Barbour, and C. W. Patton, as Special Commissioners, to have said bridges removed and rebuilt at the places proposed and to open up the said public road along the south bank of said River. These said Commissioners, with the approval of the said County Judge, have entered into a contract right recently with the defendant, the Larimer and Burgett Bridge Company, to take down and remove the said bridges and to rebuild them at the places proposed, and the said defendant, the Larimer and Burgett Bridge Company, has already begun work under said contract and are now engaged in constructing a temporary wooden bridge across said river north of the Divide for the use of the travelling public at the point where the steel bridge now is, preparatory to moving said steel bridge and constructing it across the south fork of the river, and are preparing to take down the bridge across the washout and move it down the river two miles and a half to the forks of the road where it is proposed to construct it across the said north prong of said Forked Deer River, and unless said Bridge Company and the other

defendants are enjoined from so doing they will carry out their said purpose to remove said bridges and abandon said road and thus work an irreparable injury to your complainant and other land owners north and west of Forked Deer River and thus entail an enormous amount of expense on the taxpayers of Lauderdale County, Tenn., to carry out the said proposed work.

Your complainant shows further that they file this bill on behalf of themselves as landowners of Lauderdale County, Tenn., and other landowners north and west of said river and on behalf of themselves as taxpayers of Lauderdale County, Tenn., and the other taxpayers of Lauderdale County, Tenn. They show and state and charge that the action of the Quarterly Court in ordering said road closed up and said bridges moved was without authority of law, the said Quarterly Court having no power to open or close especially without notice to the parties interested and affected thereby, and such Quarterly Court was so notified at the time it took said action, but proceeded any way without authority of law, and in derogation of the rights of your complainant and other landowners and taxpayers of Lauderdale County, Tenn.

Complainant shows further that the County of Lauderdale has a Special Road Law passed March 25, 1919, which controls the opening, laying out, closing and working of public roads in Lauderdale County, Tenn., and this law provides as follows:

> "That all applications for opening, changing, restoring or widening of public roads in the Counties coming under the provisions of this Act, shall be done on the petition of the District Road Commissioner of the District in which said road lies, or upon the petition of any citizen or taxpayer of the county, and said

petition shall be to the County Judge of the County and ten days notice of the filing of said petition, shall be given to all land owners, over whose land said proposed road will be run."

This law provides further that any party affected by said petition may have the right to appear and make defense and may have the County Judge of Lauderdale County to assess any damages which may be sustained by said action against the county to be paid out of the district highway funds in which said road lies, and it provides for the payment of costs etc.

Your complainant, by the summary action of the said Quarterly Court, has been deprived of all right of defense against said proposed changes and of all right to have any damages to which it may be entitled assessed against said district highway fund, and in fact by said action it has been stripped of all of its legal rights and subjected to irreparable damages in order that other designing parties may be benefited thereby and have the value of their lands increased. And your complainant is informed and charges that it has no other remedy except to come into Your Honor's Court on behalf of itself and all other land owners and taxpayers in that section of the country and to have the defendants enjoined from proceeding to carry out said changes and to have said resolution and order of the said Quarterly Court declared void and inoperative. A map of the section of country, showing complainant's land and the location at present of said bridges and road and the proposed changes, is herewith filed as Exhibit "A" to and made a part of this bill, but the same need not be copied unless called for. Your Complainant is engaged in Lauderdale County, Tenn., in cutting, hauling, and removing timber from this and other lands which it owns in Lauderdale County and in doing so is operating quite an ex-

tensive camp and railroad or log road across this and its other land in Lauderdale County to the Mississippi River.

The PREMISES CONSIDERED, Your Complainant prays:

That copy and process issue and be served on the defendants requiring them and each of them to appear and answer this bill, but the oath to their answer is waived; that it be allowed to file this bill on behalf of itself and all other landowners in that section of the country (who are too numerous to set out here by name) affected by said change and damaged thereby, and all other taxpayers of Lauderdale County, Tennessee; that an injunction issue upon the fiat of Your Honor restraining each and all of the defendants from proceeding further or taking any other step towards making the changes ordered by said resolution of the Quarterly Court and particularly from abandoning said public road or taking down the said bridge across the Forked Deer River north of the Divide where it now is or from taking down that part of the bridge across the Wash Out which is now standing and to which repairs may be made on said bridge, but it does not desire to enjoin any of them from repairing or rebuilding the said bridge across the washout or taking any steps towards repairing or rebuilding of the same so as to make the same useful for the traveling public along said public road; it prays further for an injunction against the County Judge the Financial agent of said County, paying out any of the funds of the county for any work already done or hereafter to be done on said proposed changes, except to pay for any work in removing any and all parts of the bridge across the washout or doing any other work on the same advisable or useful in repairing the same: that the resolution of the Quarterly Court above referred to declared

void and inoperative and ineffective to authorize the proposed changes in said road and bridges; complainant prays for all such other, further and general relief as the nature of the case may require and to Equity doth belong.

This is the first application for writ of injunction in this cause.

Craig, Bullock and Durham
Solicitors for Complainant.

State of Tennessee
Lauderdale County.

A. P. Thurman being duly sworn makes oath that he is agent of and general manager of the Complainant, the Mengel Company, being its General Superintendent in Lauderdale County, Tenn. and that the facts and statements made in the foregoing bill are known to him, and those made therein of his own knowledge are true and those made on information and belief, he believes to be true.

A. P. Thurman

Sworn to and subscribed before me this August 29, 1920.

A. O. Durham,
Clerk and Master.

To the Clerk and Master of the Chancery Court at Ripley, Tenn.:

File this bill and issue the writ of injunction prayed for in said bill on the Complainant giving an injunction bond as required by law in the sum of five hundred dollars.

Jno. Y. Peete
County Judge of Tipton
County, Tenn.

Endorsed:—
Filed August 30, 1920.

A. O. Durham, C and M.

ORDER

[Caption Omitted]
(Entered March 23, 1966)

Plaintiff's motion for re-consideration of the order of March 2, 1966, denying remand of this case to the State court from which it was removed, was heard by the court March 17, 1966.

At the hearing, counsel for plaintiff contended that, for the purpose of determining its jurisdiction herein, the court must construe the complaint and the prayers thereof as they would be construed by the Tennessee court in which the case was instituted. He further contended that, under such construction, the only relief which could have been granted by the Tennessee court would have been the specific injunctive relief prayed for, an injunctive relief which this court has no jurisdiction to grant because of Section 4 of the Norris-LaGuardia Act.

The court was of the opinion, however, that even if the court, to determine its jurisdiction, were required to construe the complaint and its prayers according to Tennessee law, the same conclusion would be reached as that embodied in the order complained of. Under Tennessee law, a complainant who has prayed for general relief is entitled to any relief appropriate to the pleadings and proof, whether or not he has specifically prayed for such relief. *Holston National Bank* v. *Wood,* 125 Tenn. 6; *Rhodes* v. *Johnson,* 32 Tenn. App. 127, 222 S.W.2d 38; *Gibson's Suits in Chancery,* 5th Ed., § 159. The only exception to this rule is that relief so inconsistent with the special prayer as to take a defendant by surprise cannot be granted. *Allum* v. *Stockbridge,* 67 Tenn. 356.

It will be noted that Tennessee law on this question of what relief can be obtained under the prayer for general relief is similar to the federal law as expressed in *Watts* v. *Waddle,* 31 U.S. 389.

Accordingly, the motion for re-consideration was denied.

/s/ *Frank Gray Jr.*
United States District Judge

NOTICE OF APPEAL

[Caption Omitted]

(Filed March 28, 1966)

Notice is hereby given that Avco Corporation, the complainant in the above named suit, removed by the defendants from the Chancery Court for Davidson County, Tennessee, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the orders entered herein on March 2, 1966 and March 23, 1966, respectively.

Dated March 25, 1966.

Waller, Lansden & Dortch
American Trust Building
Nashville, Tennessee 37201

Naphin, Sullivan & Banta
105 West Adams Street
Chicago, Illinois 60603
By /s/ *Robert G. McCullough*
/s/ *William Waller*
Attorneys for
Avco Corporation

OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 17207

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

AVCO CORPORATION,
Plaintiff-Appellant,
v.
AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided May 2, 1967.

Before: EDWARDS and CELEBREZZE, Circuit Judges and BATTISTI*, District Judge.

CELEBREZZE, Circuit Judge. The question presented on this appeal is whether an action seeking to enjoin a breach of a no-strike provision in a collective bargaining agreement may be removed from State to Federal Court.

Avco Corporation (Avco) is a Delaware Corporation, qualified to do business in Tennessee. Avco is engaged in

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* Honorable Frank J. Battisti, United States District Judge, Northern District of Ohio, Eastern Division, sitting by designation.

interstate commerce, and its Tennessee manufacturing and assembly plant doing a substantial amount of aircraft structures work has a direct impact on the national defense. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, (Union) is the sole collective bargaining agent for approximately 2,000 production and maintenance employees of Avco's manufacturing plant in Nashville, Tennessee.

A series of work stoppages at the Nashville plant culminated in a plant-wide strike on October 15, 1965. The collective bargaining agreement then in force provided that there would be no work stoppage or strikes, and the bargaining contract further provided for a method of settling grievances, including a provision for binding arbitration.

Avco instituted suit in the Chancery Court for Davidson County, Tennessee, seeking to enjoin the Union from striking, and asking also for general relief. The complaint did not involve any allegation of violence in connection with the strike, and hence no foundation for the employment of state injunctive power under the police power doctrine. After the Chancery Court issued a temporary injunction the Union filed a petition for removal of the cause to the United States District Court. Upon removal, the Union filed a motion to dissolve the temporary injunction, and to dismiss the action upon the alleged ground that the complaint sought, and Avco had been granted, an injunction which the District Court had no power to issue or maintain by reason of the restrictions of the Norris-La Guardia Act. Avco moved to remand the action to the State Court upon the ground that the complaint was not founded on a claim arising under the laws of the United States within the meaning of the Removal Act, but instead was founded

upon breach of contract arising under State law. Avco further maintained that the District Court, by virtue of the Norris-La Guardia Act, did not have original jurisdiction within the meaning of the Removal Act. The District Court dissolved the temporary injunction, but refused to dismiss the action. The motion to remand was denied. Avco appeals.

The question presented here is identical to the question presented in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers,* 338 F.2d 837 (C.A. 3, 1964), cert. den. 380 U.S. 935 (1965). In *American Dredging, supra,* the Court remanded the case to the State Court on the ground that the action, based solely on a State created right, did not come within 28 U.S.C., Section 1441, which permits removal of a civil action to a Federal Court which has jurisdiction under a law of the United States. We decline to follow *American Dredging,* and affirm the judgment of the District Court.

This action was removed to Federal Court pursuant to the provisions of 28 U.S.C., Section 1441(b) which provides, in part:

> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Avco maintains that this case does not come within the scope of this removal authorization because its claim does not arise under the laws of the United States and further that Section 4 of the Norris-LaGuardia Act, 29 U.S.C., Section 104, withdraws jurisdiction from Federal Courts to grant the injunctive relief sought in the complaint.

We cannot accept the basic premise of Avco's argument that its action is based solely upon a State created right. Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185,[1] confers jurisdiction upon the District Court without regard to diversity of citizenship or jurisdictional amount to enforce collective bargaining agreements in industries affecting interstate commerce. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), held that Federal substantive law preemptively applies in suits under Section 301, the Court stating:

> "The question then is, what is the substantive law to be applied in suits under Section 301(a)? We conclude that the substantive law to apply in suits under Section 301 (a) is federal law, which the courts must fashion from the policy of our national laws. * * *
>
> "Federal interpretation of the Federal law will govern, not State law. Cf. Jerome v. United States, 318 U.S. 101, 194. But State law if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the Federal policy (Citations omitted). Any State law applied, however, will be absorbed as Federal law and will not be an independent source of private rights."

This enunciated principle was reaffirmed in *Teamsters, Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), p. 103:

> "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be

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[1] 29 U.S.C.A., Section 185(a)—Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

> paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by § 301(a) to be decided according to the precepts of federal labor policy."

Thus, according to the findings of the Supreme Court, as enunciated in *Lincoln Mills, supra,* and expanded in *Lucas Flour Co., supra,* all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts. While State courts may have concurrent jurisdiction, they are bound to apply Federal law. *Charles Dowd Box Company* v. *Courtney,* 368 U.S. 502 (1962). The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint.

In view of the express finding in *Lucas Flour, supra,* Avco's contention that its action is founded upon a breach of contract arising under State law is without merit. The action is based upon a violation of a no-strike agreement arising out of a collective bargaining agreement in an industry affecting interstate commerce. Had the action remained in the State Court, the State Court, under the doctrine of *Lincoln Mills* and *Lucas Flour,* was bound to apply Federal and not State law.

Finding that Avco's claim is one arising under the laws of the United States, we next consider whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C.A., Section 104, withdrew jurisdiction from Federal Courts.

> "Section 4 of the Norris-LaGuardia Act provides, in part:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such disputes (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> "(A) Ceasing or refusing to perform any work or to remain in any relation of employment: * * *."

We do not think "jurisdiction" has the same meaning in Section 4 of the Norris-LaGuardia Act as it does in Section 301 of the Labor Management Relations Act. The Norris-La Guardia Act does not deny to Federal Courts jurisdiction over the parties or the subject matter. The Federal Courts are denied the power to grant injunctive relief under the provision of Section 4 of the Act, and permitted to grant injunctive relief under the provision of Section 7 of the Act. The Norris-La Guardia Act does not limit the power of the Court to entertain the suit. As stated by the District Court, "the mere fact that a prohibited labor injunction is among the remedies sought does not mean that a District Court lacks original jurisdiction over the cause of action for the purposes of awarding other relief."

The loss of the power to grant certain equitable remedies does not mean Federal Courts have lost jurisdiction over the subject matter or parties.

In *Pusey and Jones Co.* v. *Hanssen*, 261 U.S. 491, 500 (1923), Mr. Justice Brandeis said:

> "The objection that a bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court (citations omitted). The objection may * * * be taken by the court of its

> own motion. But, unlike lack of jurisdiction as a federal court, (citations omitted) lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject matter of the suit is of a class of which equity has jurisdiction."

Mr. Justice Stone said in *DiGiovanni* v. *Camden Fire Insurance Assoc.*, 296 U.S. 64, 69 (1935):

> "Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give."

Whether "jurisdiction" in Section 4 means equity jurisdiction or jurisdiction over the subject matter has been fully considered by Professor Chafee, *Some Problems of Equity*, Chapters 8 and 9 (1950). In commenting on congressional limitation on federal judicial power by the Norris-La Guardia Act, Professor Chafee said:

> "Everybody in this four-sided row among the Justices took it for granted that 'no court * * * shall have jurisdiction * * *' meant 'no court shall have power * * *' yet clearly the District Judge had jurisdiction over the parties, and * * * he also had jurisdiction over the subject matter. The District Court did have power to decide labor disputes, and it could at least award damages for acts which, the statute said, were not to be enjoined. This being so, nothing further was required to give that Court power to act, which includes power to act wrongly * * *. In short, the [Norris-La Guardia] Act says, in effect, 'no court shall have equity jurisdiction * * *', and lack of equity jurisdiction * * * is not lack of power." (Page 368).

Under Section 7 of the Norris-La Guardia Act, Federal Courts may grant injunctions under certain enumerated circumstances. Professor Chafee cogently argued that if Federal Courts have no subject matter jurisdiction, then how can the Court sit without jurdisdiction until certain facts are proved and then decide whether it has the power to act? The answer is, jurisdiction attaches from the beginning or not at all.

The strike against Avco gave rise to a single cause of action for which any number of different remedies were available. See *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6 (1951), where the Supreme Court defined cause of action as being predicated on a single wrong to plaintiff for which relief is sought. While the injunctive remedy has played an important part in the history of labor law, such close relationship between this effective remedy and the cause of action does not mean the two are coextensive. Here the complaint stated a single cause of action. The relief prayed for was an injunction and general relief. If Avco had not asked for general relief, it would have been entitled to any appropriate relief, other than an injunction, under Rule 54(c), Federal Rules of Civil Procedure.[2] Under the Rules of Civil Procedure, federal courts in their discretion may grant relief of a kind not requested in the

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[2] Rule 54(c), Rules of Civil Procedure. Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

pleading of either party. *Mercury Oil Refining Co.* v. *Oil Workers Int. Union, CIO,* 187 F.2 980.

In *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Supreme Court held that Section 301 had not so narrowed the provision of Section 4 as to permit injunctions growing out of a labor dispute. The Court dismissed the count requesting an injunction, and the District Court, having jurisdiction over the parties and the subject matter, was free to go to trial on the merits of the count requesting damages.

While *Sinclair* v. *Atkinson, supra,* rests on plain language and legislative purpose, the Court said, at page 303:

> "* * * Section 301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-La Guardia Act."

Though Section 4 specifically applies only to Federal Courts, there was, nevertheless, a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law.[3] The effect of Section 4 was not to authorize State Courts to grant injunctive relief, they already had that power. However, the substantive powers of the States to determine labor law and labor policy in labor disputes arising out of collective bargaining agreements in indus-

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[3] An employer may obtain an order directing a Union to comply with its agreement to arbitrate. A strike in the face of such an order could result in contempt proceedings. This alternative remedy is referred to in *Sinclair Refining Co.* v. *Atkinson, supra,* page 214 and page 227, Fn. 23.

tries affecting interstate commerce has now been taken away by Federal law.

Federal Courts are solely responsible for developing a single, consistent body of Federal labor law. The Supreme Court said in *Teamsters Local 174* v. *Lucas Flour Co., supra,* page 103:

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' (Citations omitted). The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation."

If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity of application, the remedies available in State Courts are limited to the remedies available under Federal law.

Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The Congress has declared that injunctions shall not issue to restrain peaceful picketing.

The judgment of the District Court denying the motion to remand is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,207

AVCO CORPORATION,
Plaintiff-Appellant,

vs.

AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Defendants-Appellees.

Before EDWARDS and CELEBREZZE, *Circuit Judges,* and BATTISTI, *District Judge.*

JUDGMENT.

APPEAL from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
Carl W. Reuss
Clerk

A True Copy.
Attest:

_____
Carl W. Reuss, Clerk

Issued as Mandate:
COSTS: NONE

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Printing ..... $_____

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Total ..... $_____

SUPREME COURT, U. S.
JUL 31 1967
JOHN F. DAVIS, CLERK

No. 445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Avco Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 2, 1967.

OPINION BELOW

The opinion of the Court of Appeals is officially reported in 376 F.(2d) 337 and appears herein as Appendix A, at pp. App. 1-12.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1967 (Appendix A, *infra*, p. App. 11). This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a State Court action by an employer seeking an injunction for breach of the "no-strike clause" in a collective bargaining agreement may be removed to the United States District Court as a case arising under the laws of the United States of which the Federal Court would have original jurisdiction; and (2) whether, after removal, a State Court injunction previously issued enforcing a "no-strike clause" should be dissolved by the United States District Court.

STATUTES INVOLVED

This case involves Sections 1441 and 1447 of the Removal Act of 1948, 62 Stat. 937, 939; Section 4 of the Norris-LaGuardia Act of 1932, 47 Stat. 70; and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156. The relevant statutory provisions are set forth in Appendix B, *infra*, pp. App. 13-15.

STATEMENT

The State Chancery Court suit.

On October 15, 1965, Petitioner filed its Bill of Complaint in the Chancery Court for Davidson County, Tennessee, praying for injunctive relief against recurrent strikes in violation of the express "no-strike" commitment in its collective bargaining agreement with Aero Lodge No. 735, International Association of Machinists and Aerospace

Workers (herein called "Aero Lodge"), as well as in violation of the explicit prohibition against work stoppages contained in the grievance and arbitration procedures of that agreement. The Bill averred facts showing that the interruptions of work had obstructed or halted vital production for the national defense, including military hardware then actively utilized in Vietnam, and that the legal remedy was inadequate. Named as defendants were Aero Lodge and numerous persons joined individually and as officers or committee members of Aero Lodge, together with other persons joined individually and as representatives of the class engaged in the activities alleged. (P.A. 2a-10a)[1]

On the same date, a Chancellor of the Chancery Court for Davidson County directed the issuance of a temporary injunction as prayed for, upon the giving of an appropriate bond in the amount of $10,000.00. (P.A. 10a)

The proceedings in the U. S. District Court.

The defendants named in the Bill thereupon filed a Petition for removal of the cause to the United States District Court for the Middle District of Tennessee, Nashville Division. (P.A. 11a) Immediately thereafter, they filed in the District Court a motion to dissolve the temporary injunction, and to dismiss the case, advancing the argument that the complaint sought, and Petitioner had been granted, relief which the District Court had no power to issue and maintain under the limitations of the Norris-La-Guardia Act.[2]

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[1] The Appendix to its Brief filed by Petitioner in the court below, a certified copy of which has been filed herein pursuant to Rule 21, will be referred to as Petitioner's Appendix ("P.A.").

[2] 47 Stat. 70, 29 U.S.C. § 104.

Petitioner promptly moved in the District Court to remand the cause to the Chancery Court for Davidson County, urging (1) that the suit was not founded on a claim arising under the laws of the United States, as averred in the removal Petition, but instead was founded on a claim of breach of contract arising under state law, and (2) that the District Court, by reason of the Norris-LaGuardia Act, had no original jurisdiction satisfying the requisites of the Removal Act.[3]

The District Court by its order entered March 2, 1966, denied the Petitioner's motion to remand, granted the motion to dissolve the injunction, and denied the motion to dismiss the action. (P.A. 16a-21a). In refusing to remand the cause to the Tennessee Chancery Court, the District Court expressly recognized that the Court of Appeals for the Third Circuit had held squarely to the contrary in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers* (CA 3; 1964) 338 F. (2d) 837; cert. den. (1965) 380 U.S. 935. (P.A. 17a)

After a motion for reconsideration before the District Court was denied by an order entered on March 23, 1966, an appeal was taken by Petitioner to the Court of Appeals for the Sixth Circuit. (P.A. 35a-36a)

The decision of the Court of Appeals.

On appeal the Court of Appeals refused to accept the holding of its sister Circuit in *American Dredging*[4] and

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[3] The joinder of Tennessee citizens as defendants rendered the case removable only under Section 1441(b), which in turn necessitates the establishment of "arising under" jurisdiction founded on the "laws of the United States." 62 Stat. 937, 28 U.S.C. § 1441(b).

[4] *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers, supra.*

affirmed the judgment of the District Court. (Appendix A, *infra*) Rejecting the concept that Petitioner's suit in the Chancery Court had been based exclusively upon a state-created right, the Court of Appeals characterized all actions involving the breach of collective bargaining agreements in industries affecting interstate commerce as preemptively governed by Section 301 of the Labor Management Relations Act.[5] According to the Sixth Circuit's reading of *Lincoln Mills* and *Lucas Flour*[6], state law no longer exists "as an independent source of private rights to enforce collective bargaining contracts." (Appendix A, *infra*, p. App. 5) Also, federal law does not permit continued injunctive enforcement of collective bargaining agreements by state courts.

Having depicted Petitioner's action as one arising under the laws of the United States and, therefore, removable, the Court of Appeals went on to declare that Section 4 of the Norris-LaGuardia Act[7] did not withdraw jurisdiction of the Petitioner's suit from the federal courts so as to defeat removal. In so doing, the court below emphatically rejected the Third Circuit's decision in *American Dredging*. That court had stated that the proposition that a court might have subject matter jurisdiction without the concomitant power to grant a final decree on the merits was " . . . what Mr. Justice Frankfurter once characterized, in

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[5] 29 U.S.C. § 185.

[6] *Textile Workers* v. *Lincoln Mills* (1957) 353 U.S. 448; *Teamsters Local 174* v. *Lucas Flour Co.* (1962) 369 U.S. 95.

[7] 29 U.S.C. § 104.

another context, 'a fox-hunting theory of justice that ought to make Bentham's skeleton rattle' . . .'"[8]

The Court of Appeals approved the action of the District Court in dissolving the State Court injunction previously issued. The Court of Appeals recognized that Norris-LaGuardia "specifically applies only to the federal court" (Appendix A, *infra,* p. App. 9) but nonetheless announced the view that uniform development of the federal law of labor contracts would be undermined by the existence of the differing injunctive remedies available in the various states. Hence, the Court asserted that "the remedies available in state courts are limited to the remedies available under federal law." (Appendix A, *infra,* p. App. 10) In other words, because of the enactment in 1947 of Section 301 of the Labor Management Relations Act, 1947, Section 4 of the Norris-LaGuardia Act, which by its express terms refers only to "courts of the United States", has now been extended to apply to the courts of every state in the union. Summarizing the opinion of the Court of Appeals in its own words (Appendix A, *infra,* p. App. 11):

> "Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The Congress has declared that injunctions shall not issue to restrain peaceful picketing."

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[8] 338 F. (2d) 837, 842.

REASONS FOR GRANTING THE WRIT

1. There is a Conflict Among the Circuits.

On the issue of remand presented in this case, the Third circuit and the Sixth Circuits are squarely in conflict. In its opinion in the instant case, the Court of Appeals for the Sixth Circuit stated in unequivocal terms:

> "The question presented here is identical to the question presented in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers,* 338 F.2d 837 (C.A. 3, 1964), cert. den. 380 U.S. 935 (1965). In *American Dredging, supra,* the Court remanded the case to the State Court on the ground that the action, based solely on a State created right, did not come within 38 U.S.C., Section 1441, which permits removal of a civil action to a Federal Court which has jurisdiction under a law of the United States. We decline to follow *American Dredging,* and affirm the judgment of the District Court." (App. A, *infra,* p. App. 3)

The District Courts which have considered the question are also divided on the subject of remand.[9] So are the

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[9] Remand granted: *Castle & Cooke Terminals, Ltd.* v. *Local 137, Longshoremen's Union* (D.C. Haw.; 1953) 110 F. Supp. 247; *Swift & Company* v. *United Packinghouse Workers of America, et al.* (D.C. Colo.; 1959) 177 F. Supp. 511; *Kroger Co.* v. *Retail Store Union, Local No. 1099* (D.C.S.D. Ohio; 1964) 56 LRRM 2893; *Kroger Co.* v. *Milk and Ice Cream Drivers, et al.* (D.C.S.D. Ohio; 1966) 61 LRRM 2692; *California Packing Corp.* v. *ILWU Local 142* (1966) 253 F. Supp. 597; *National Dairy Products Corp.* v. *Heffernan* (1961) 195 F. Supp. 153; *American Optical Co.* v. *Andert, et al.* (1952) 108 F. Supp. 252; *Merchant's Refrigerating Co.* v. *Warehouse Union* (N.D. Calif.; 1963) 213 F. Supp. 177; *Hat Corp. of America* v. *United Hatters* (D. Conn.; 1953) 114 F.

commentators.[10]

Because of the conflict among the federal courts, the law on this crucial question is currently in a state of confusion. A decision of the question by this Court is imperative.

2. **The Decision Presents an Important Question of Federal Law Which Has Not Been, And Should Be, Settled by This Court.**

A. Significance of the decision.

If the decision of the Sixth Circuit is correct, no employer can obtain injunctive relief in any court in the land against

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Supp. 890; *Sandsberry* v. *Gulf C. & S. F. Ry.* (N.D. Tex.; 1953) 114 F. Supp. 834; *Associated Telephone Co.* v. *CWA* (S.D. Calif.; 1953) 114 F. Supp. 334.

Remand denied: *Crestwood Dairy* v. *Kelly* (D.C.E.D. N.Y.; 1963) 222 F. Supp. 614; *Tri-Boro Bagle Co.* v. *Bakery Drivers Union* (D.C.E.D. N.Y.; 1963) 228 F. Supp. 720; *Publishers Assoc.* v. *Pressmen's Union* (D.C.S.D. N.Y.; 1965) 246 F. Supp. 293; *Fay* v. *American Cystoscope Makers* (S.D.N.Y.; 1951) 98 F. Supp. 278; *Food Fair Stores* v. *Retail Clerks* (E.D. Pa.; 1964) 229 F. Supp. 123; *S. E. Overton Co.* v. *Teamsters* (W.D. Mich.; 1953) 115 F. Supp. 764 and *Pocahontas Terminal Corp.* v. *Portland Building Council* (D. Me.; 1950) 93 F. Supp. 217.

[10] Articles and comments favoring remand: *Lesnick,* 79 Harv. L. Rev. 757; *Moskowitz,* 46 Boston U. L. Rev. 343; *Janofsky & Vaughn,* 7 B.C. Ind. & Com. L. Rev. 869; and comments in 65 Colum. L. Rev. 907; 41 Notre Dame Lawyer 88; 113 U. of Pa. L. Rev. 1096; 6 B.C. Ind. & Com. L. Rev. 957; 17 Mercer L. Rev. 442.

Articles and comments opposing remand: *Stern,* 39 Temp. L. Q. 65; *Aaron,* 63 Colum. L. Rev. 1027; *Ratner,* 38 F.R.D. 81; and comments in 78 Harv. L. Rev. 1665; 22 Wash. & Lee L. Rev. 255; 44 N.C. L. Rev. 188; 38 Temp. L. Q. 361; 51 Va. L. Rev. 973; 32 Tenn. L. Rev. 264; 60 Nw. U. L. Rev. 489; 19 Rutgers L. Rev. 507; and 52 Cornell L. Q. 132.

a peaceful strike in breach of contract, even though the legal remedy is clearly inadequate.

In *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195; 8 L.E. (2d) 440, this Court held that because of the provisions of Section 4 of the Norris-LaGuardia Act (47 Stat. 70; 29 U.S.C. § 104) no *federal* court may grant injunctive enforcement of a no-strike clause. In that decision, this Court recognized, however, that Norris-LaGuardia was intended to apply only to federal courts. At page 196, the Court stated that Norris-LaGuardia "barred *federal* courts from issuing injunctions." (Emphasis added) This construction was in accord with the plain language of the Act.[11] Thus, *Sinclair* did not itself close the door to continued injunctive relief in the state courts.

The instant case clearly goes beyond *Sinclair* and does close the doors of the state courts to injunctive relief. It holds that a suit for injunctive relief against violation of a no-strike clause is a suit arising under the laws of the United States (to-wit, Labor Management Relations Act, 1947, Section 301) and as such is removable to the district court under 28 U.S.C. 1441(b) as a suit "of which the district courts have original jurisdiction." Under this ruling all that any union has to do to prevent injunctive enforcement of its no-strike pledge is to remove the state court suit to federal court. By this single action, injunctive relief will be precluded. The court went even further and stated that the state courts themselves may no longer issue injunctions. The court said "The remedies available in State Courts are limited to the remedies available under Federal law." (Appendix A, *infra*, p. App. 10)

The questions presented have been anticipated by this Court. In *Charles Dowd Box Co.* v. *Courtney* (1962) 368

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[11] "No *court of the United States* shall have jurisdiction to issue any restraining order or temporary or permanent injunction * * * " (Emphasis added)

U.S. 502; 7 L.E. (2d) 483, the Court stated, in footnote 8, that:

> "In the course of argument at the Bar two questions were discussed which are not involved in this case, and upon which we expressly refrain from intimating any view—whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for violation of a contract made by a labor organization, and *whether there might be impediments to the free removal to a federal court of such a suit.* The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court. * * * And quite obviously *we have not yet considered the various problems concerning removal under* 28 USC § 1441." (Page 514; emphasis added)

Also, in his dissenting opinion in *Sinclair, supra,* Mr. Justice Brennan observed that "So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible." (370 U.S. at p. 226) He foresaw that if removal of such suits is allowed "the result * * * is that § 301 will have had the strange consequence of taking away a contract remedy available before its enactment." (370 U.S. at p. 227)

B. Importance of Specific Performance of the No-Strike Clause.

The importance to an employer of a specifically enforceable no-strike clause in a labor contract cannot be overstated. A well-known commentator has observed that:

> ". . . about all an employer can get in exchange for his commitment in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge

and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed * * *"[12]

In *Lincoln Mills, supra,* this Court itself observed that in enacting Section 301 Congress was,

". . . interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report, supra, p. 16 states:

'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.'" (353 U.S. 453-454)

Persons with experience in this field are well aware that injunctive relief is the only "*effective* method of assuring freedom from economic warfare for the term of the agreement." (353 U.S. at p. 454; emphasis added) This Court pointed out in *NLRB* v. *Denver Building and Construction Trades Council,* (1951) 341 U.S. 675, that a mere placard, carried by one or two workers, can constitute a "signal, tantamount to a direction to strike." (Page 690) Obviously, when a strike thus initiated by a few in breach of contract throws hundreds or thousands of employees out of

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[12] *Gregory.* The Collective Bargaining Agreement: The Nature and Scope. (1949) Wash. U. L. Q. 3, 12.

work without pay and shuts down an entire plant, cutting off deliveries to customers and perhaps even resulting in a permanent shift of business relationships, money damages are "patently a miserable substitute for performance."[13] It has been aptly said that such a:

> ". . . strike in breach of contract irreparably harms the employer. Orders are lost. Customers transfer their favor to employers who meet deadlines. The discharge of strike leaders does not end the strike; at best, it stops further efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. Equitable relief is not only the most appropriate remedy, but also the only effective one."[14]

The damage remedy is peculiarly ineffective in a strike situation, because the discipline which makes the strike possible also enables the union leaders to insist on dismissal of the damage suit as a condition to ending the strike.[15] In many cases, therefore, the damage remedy is merely a mirage.

Under established principles of equity jurisdiction, injunctive relief is not granted unless the court first determines that the legal remedy is inadequate. It must be assumed, therefore, that the ruling in the instant case will preclude equitable relief even though the legal remedy is clearly inadequate.

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[13] *Rice*, Paradox of Our National Labor Law, 34 Marquette L. Rev. 233, 253, 235, note 15 (1951).

[14] *Stewart*, No Strike Clauses in the Federal Courts. (1961) 59 Mich. L. Rev. 673, 674-75.

[15] *Swigert*, "Where Labor Unions Get Their Power." U. S. News & World Report, January 21, 1965, at page 97.

C. The Errors in the Decision of the Sixth Circuit.

(1) Avco's state court suit did not arise "under the Constitution, treaties or laws of the United States."

An action is not removable under 28 U.S.C. § 1441 unless it is "founded on a claim or right arising under the Constitution, treaties or laws of the United States." The court below expressly found that "Avco's contention that its action is founded upon a breach of contract arising under State law is without merit" and that "Avco's claim is one arising under the laws of the United States." (App. A, *infra*, p. App. 5) It is submitted that these findings are erroneous.

State courts were enjoining strikes in breach of contract long before the enactment of Section 301. Subsequent to the enactment of Section 301, they have continued to grant injunctive relief.[16] Section 301 has mere-

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[16] *McCarroll* v. *Los Angeles County District Council* (1958) 49 Calif. (2d) 45; 315 Pac. (2d) 322; cert. den. 355 U.S. 932 (1958); *McLean Distributing Co.* v. *Brewery and Beverage Drivers* (1959) 254 Minn. 204; 94 N.W. (2d) 514; cert. den. (1959) 360 U.S. 917; *Dugdale Construction Co.* v. *Operative Plasterers Local 538 of Omaha* (1965) 257 Iowa 997; 135 N.W. (2d) 656; *General Building Contractors Assoc.* v. *Local 542* (1952) 370 Pa. 73; 87 Atl. (2d) 250; *Philadelphia Marine Trade Assoc.* v. *Longshoremen's Assoc.* (1955) 382 Pa. 326; 115 Atl. (2d) 733; cert. den. 350 U.S. 843; 100 L.E. 751; *Shaw Electric Co., Inc.* v. *IBEW Local Union No. 98* (1965) 418 Pa. 1; 208 Atl. (2d) 769; *Armco Steel Corp.* v. *Perkins* (1967) ..... Ky. .....; 411 S.W. (2d) 937; 64 LRRM 2539; *General Electric Co.* v. *UAW-CIO* (1952) 93 O.A. 139; 108 N.E. (2d) 211; app. dis. 158 O.S. 555; 110 N.E. (2d) 424; *Associated General Contractors* v. *Trout* (1961) 59 Wash. (2d) 90; 366 Pac. (2d) 16; *Alabama Cartage Co.* v. *International Brotherhood of Teamsters* (1948) 250 Ala. 372; 34 So. (2d) 576; *Dairymen's League Cooperative Assoc., Inc.* v. *F. A. Conrad*, 33 Misc. (2d) 914; 228 N.Y.S. (2d) 420; aff. 16 A.D. (2d) 869; 229 N.Y.S.

ly added an additional remedy. State jurisdiction is impaired only to the extent that doctrines of local substantive law are incompatible with federal substantive law. *Local 174* v. *Lucas Flour Co.* (1962), 369 U.S. 95; 7 L.Ed. (2d) 593, at pages 102-104. Injunctive relief involves no conflict of substantive law.

Clearly, Aveo's suit, brought in state court, was not "founded on a claim or right arising under" Section 301. In *Charles Dowd Box Co.* v. *Courtney, supra,* this Court stated that:

> "On its face § 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. The statute does not state nor even suggest that such jurisdiction shall be exclusive." (368 U.S. at page 506)

(2d) 736 (1962); *Bee Line, Inc.* v. *Long Island Local 252, Transport Workers Union of America, CIO* (1956) 157 N.Y.S. (2d) 232; *Anchor Motor Freight* v. *Local Union No. 445 of the International Brotherhood of Teamsters,* 12 Misc. (2d) 757; 171 N.Y.S. (2d) 506; aff. 5 A.D. (2d) 869; 171 N.Y.S. (2d) 511 (1958); further proceedings reported at 10 A.D. (2d) 994; 204 N.Y.S. (2d) 98; 11 A.D. (2d) 766; 204 N.Y.S. (2d) 891; *Republic Aviation Corp.* v. *Republic Lodge No. 1987, International Assoc. of Machinists* (1957) 10 Misc. (2d) 783; 169 N.Y.S. (2d) 651; *McLean Trucking Co.* v. *Doyle,* 17 Misc. (2d) 478; 184 N.Y.S. (2d) 114; aff. 8 A.D. (2d) 789; 188 N.Y.S. (2d) 943 (1959); motion for leave to app. den. 9 A.D. (2d) 677; 193 N.Y.S. (2d) 223; *A. I. Gage Plumbing Supply Co.* v. *Local 300 of International Hod Carriers, Building & Common Laborers Union,* 202 Calif. App. (2d) 197; 20 Calif. Rep. 860; 92 A.L.R. (2d) 1223 (1962); *Foley Construction Co.* v. *Truck Drivers, Chauffeurs and Helpers Local No. 100, et al.* (1960) 85 Abs. 332, 14 O.P. (2d) 59, 172 N.E. (2d) 170.

The Court stated that:

> "The legislative history makes clear that *the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums* for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that *Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.*" (Pages 508-509; emphasis added)

The Court further said that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts *was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations.*" (At page 511)

and also stated that,

> ". . . the entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law of some of the States, *not to abolish existing state court jurisdiction.*" (Pages 511, 512; emphasis added)

The Court quoted Senator Ferguson as stating, with respect to Section 301, "*It takes away no jurisdiction of the State courts.*" (Page 512; emphasis added) The Court observed that:

> "Section 301(a) reflects congressional recognition of the *vital importance of assuring the enforceability of such agreements.*" (Page 509; emphasis added)

Similarly, in *Sinclair Refining Co.* v. *Atkinson, supra,* the Court quoted the House Conferees as having "agreed that suits for breach of such agreements should remain

wholly private and 'be left to the usual processes of the law.' " (370 U.S. at page 207)

This Court has recently stressed that:

> ". . . labor legislation is peculiarly the product of legislative compromise of strongly held views, * * * and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question."

NLRB v. *Allis-Chalmers Mfg. Co.* (1967), ... U.S. .....; 65 LRRM 2449, 2450; Accord: *National Woodworkers Assn.* v. *Labor Board* (1967), ... U.S. .....; 64 LRRM 2801. In *Lincoln Mills, supra,* the Court forecast that the decision in that case would give rise to future problems,

> ". . .in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." (353 U.S. at page 457)

In the face of the above pronouncements of Congress and of this Court with respect to national policy, it seems evident that the Sixth Circuit erred in its interpretation and application of national policy. That court said:

> "Though Section 4 [of Norris-LaGuardia] specifically applies only to Federal Courts, there was, nevertheless, a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law." (Appendix A, *infra,* p. App. 9)

The court does not clarify when this "clear declaration of congressional policy against enjoining peaceful picketing"

occurred. Certainly Norris-LaGuardia, enacted in 1932, contained no declaration of congressional policy against a state court enjoining peaceful picketing, because, admittedly, Norris-LaGuardia "applies only to Federal Courts." Also, a mere reading of the provisions of the statute, the congressional reports and debates, and the decisions of this Court quoted, *supra*, demonstrates that in 1947, when the LMRA was enacted, there was no "declaration of congressional policy against enjoining peaceful picketing." The policy of Congress in 1947 was to recognize the importance of the role played by state courts in enforcing collective bargaining agreements and to make labor contracts *more* enforceable—not *less* enforceable by adding Federal court jurisdiction which did not previously exist.

As pointed out above, Senate Report No. 105, 80th Cong., 1st Sess., quoted in *Lincoln Mills, supra,* emphasized that:

> "Without some *effective* method of *assuring* freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." (At page 16)

and further stated that:

> "Statutory recognition of the collective agreement as a valid, binding, and *enforceable* contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." (Pages 16-18; emphasis added)

In *Lincoln Mills, supra,* to be sure, the Court did conclude that:

> ". . . the *substantive* law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws." (353 U.S. at page 456; emphasis added)

Likewise, in *Lucas Flour, supra,* the Court stated that:

> "The dimensions of § 301 require the conclusion that *substantive* principles of federal labor law must be paramount in the area covered by the statute." (369 U.S. at page 103; emphasis added)

A congressional policy in favor of "substantive" uniformity does not, of course, require "procedural" or "remedial" uniformity. This is one of the places where the reasoning of the Sixth Circuit falls down, and where its reliance on "Federal preemption" (Appendix A, *infra,* p. App. 5) is erroneous. This Court specifically rejected the concept of total preemption, as distinguished from mere substantive preemption, when it stated in *Dowd, supra,* at page 513:

> "Congress expressly rejected that policy [federal preemption] with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, *Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'*" (Emphasis added)

This Court has always stressed that there are necessarily many exceptions to the Federal preemption concept. In *San Diego Building Trades Council* v. *Garmon* (1959), 359 U.S. 236; 3 L.E. (2d) 775, the Court noted that it had refused to hold state remedies preempted,

> ". . . where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [*or*] *touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.*". (At pages 243-244; emphasis added)

Injunctive enforcement of the no-strike clause by state courts is "deeply rooted in local feeling and responsibility." As shown in footnote 16, *supra*, the higher courts of many states have continued to grant such relief following the enactment of Section 301 in 1947. Moreover, ten of the twenty-four States which currently have "little Norris-LaGuardia Acts", either through express legislative action or court construction, do not apply such Acts to strikes in breach of contract.[17]

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[17] Colorado, Col. Rev. Stat. Ann. § 80-5-6(2)(c) (1963); Kansas, Kan. Stat. Ann. § 44-809(15) (1964); Louisiana, act declared unconstitutional in *Douglas Pub. Serv. Corp.* v. *Gaspard*, 225 La. 972, 74 So. 2d 182 (1954); Minnesota, Minn. Stat. § 179.11(1) (1961), see *McLean Distrib. Co.* v. *Brewery Drivers Union*, 254 Minn. 204, 94 N.W.2d 514, cert. denied, 360 U.S. 917 (1959); Montana, see *State* v. *District Court*, 61 L.R.R.M. 2159 (Mont. Sup. Ct. 1965); New York, post-Sinclair: *Perry & Sons* v. *Robilotto*, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965); *Stretcher-Traung Lithograph Corp.* v. *Lithographers Union*, 46 Misc. 2d 925, 260 N.Y.S.2d 1011 (Sup. Ct. 1965); *Thaddeus Suski Productions* v. *Vola*, 47 Misc. 2d 773, 263 N.Y.S.2d 275, aff'd, 24 App. Div. 559, 260 N.Y.S.2d 826 (1965); *Employer's Ass'n* v. *International Union*, 60 L.R.R.M. 2006 (N.Y. Sup. Ct. 1965); *Eastern Freightways* v. *Deperno*, 57 L.R.R.M. 2299 (N.Y. Sup. Ct. 1964) (not officially reported). Pre-Sinclair: *Dairymen's Ass'n* v. *Conrad*, 16 App. Div. 2d 869, 229 N.Y.S.2d 736 (1962); *Anchor Motor Freight Corp.* v. *Local 445, Int'l Bhd. of Teamsters*, 5 App. Div. 2d 869, 171 N.Y.S.2d 511 (1958), and *McLean Trucking* v. *Doyle*, 8 App. Div. 2d 789, 188 N.Y.S.2d 943 (1959); Oregon, see *Weisfield* v. *Haeckel*, 28 L.R.R.M. 2055 (Ore. Cir. Ct. 1951); Pennsylvania, Pa. Stat. Ann., Tit. 43, § 206(d)(a) (1959); see *Philadelphia Marine Trade Ass'n* v. *ILA*, 382 Pa. 326, 115 A.2d 733 (1955), cert. denied, 350 U.S. 843 (1956); Washington, injunction provisions of Act declared unconstitutional in *Blanchard* v. *Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936); see also *Associated Gen'l Contractors* v. *Trout*, 59 Wash. 2d 90, 366 P.2d 16 (1961); Wisconsin, Wis. Stat. § 111.06(2)(c) (1963).

In *Vaca* v. *Sipes* (1967) ..... U.S. .....; 17 L.E. (2d) 842, the Court reviewed exceptions to the federal preemption rule and stated:

> "While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." (At page 852)

The Court, in holding that the duty of fair representation had not been preempted by the LMRA, and could still be enforced by a state court, observed that:

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. * * * The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." (At page 853)

The analogy to the instant situation seems clear.

In 1947, a policy of extending the Norris-LaGuardia restrictions to state courts was never mentioned or considered by Congress; neither was the policy of making existing state court suits removable through enactment of Section 301. In the absence of a clear expression of congressional intent to effectuate such results, and in the face of

clearly expressed congressional intention to preserve "the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations", the Sixth Circuit was in error in basing its decision on "congressional policy." This Court has specifically recognized that a policy favoring uniformity with respect to substantive law does not necessarily apply to remedy. In *UAW-CIO* v. *Hoosier Cardinal Corp.* (1966) 383 U.S. 696; 16 L.E. (2d) 192, the Court stated that lack of uniformity in remedy is "unlikely to frustrate in any important way the achievement of any significant goal of labor policy." (Page 702)

Congress clearly intended that state courts should retain the right to construe collective bargaining agreements. *Charles Dowd Box Co., supra.* The process of construing a no-strike clause in a money damage suit is no different from the process of construing such a clause in an injunction suit. The only point at issue, therefore, relates to remedy. In the interests of uniformity did Congress intend to deprive the state courts of a traditional remedy? Nothing in the legislative history indicates such an intention.

In *Lucas Flour, supra,* the Court stated that a "basic policy of national labor legislation" was "to promote the arbitral process as a substitute for economic warfare." (369 U.S. at page 105) Accord: *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574; 4 L.E. (2d) 1409. A strike in breach of contract to circumvent the contract grievance procedure does not "promote the arbitral process" but blocks arbitration. It substitutes economic warfare for the agreed arbitral process. The impact of Section 301, and its relationship to Norris-LaGuardia and the Removal Act, must be construed in the light of dominant congressional policy, which was to make

collective bargaining agreements more enforceable through preserving the established jurisdiction of the state courts (including jurisdiction to issue injunctions) and adding an additional federal court damage remedy.

The significance of such policy factors in arriving at a correct decision in the instant situation has been recognized by commentators. One writer who has given the problem thorough analysis states that;

> "... the solution to this problem should depend upon competing policy considerations rather than a sifting of purely legal considerations. Any decision in this area should be rendered only after the policy of section 301—to make available more effective means of enforcing collective bargaining agreements—is carefully considered. The allowance of state court injunctions and the denial of removal would be one means of furthering that policy."[18]

In the words of another commentator:

> "[I]f state courts do still have the power to enjoin such strikes [in breach of contract], permitting removal would put the removal statutes to a use for which they were never intended. Although the legislative history of the Judicial Code provides no substantial insight into the congressional purpose in allowing removal of suits involving federal questions, removal was certainly not intended to foreclose entirely remedies legitimately available in state courts."[19]

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[18] *Moskowitz,* Enforcement of No-Strike Clauses by Injunction, *supra,* at page 359.

[19] 113 U. of Pa. L. Rev. 1098. Professor Moore is in accord: "The majority view, which we believe is sound, is that the federal district court must remand suits requesting injunctive relief that is beyond the federal court's original jurisdiction, even when the action couples a prayer for damages, and even when the federal court believes that the state court lacks jurisdiction." *Moore,* Federal Practice, pages 1004-5, also, see page 1009.

(2) The District Court did not "have jurisdiction" of the cause.

The Sixth Circuit was also in error in finding that the district court had "jurisdiction" of the cause within the meaning of 28 U.S.C. § 1441(b). Although "jurisdiction" is a word with many meanings[20] it basically means the right to speak. In the instant case, the Petitioner sought injunctive relief against a peaceful strike in breach of contract. In the federal courts such relief is explicitly forbidden by Section 4 of Norris-LaGuardia (29 U.S.C. § 104). It is true, as observed by the Sixth Circuit, that Norris-LaGuardia permits federal injunctions under certain circumstances. These exceptions are set forth in Section 7 (29 U.S.C. § 107). None are applicable to the instant situation. Under Section 7, before a federal court is empowered to issue an injunction, there must be a finding that "unlawful acts" have been threatened or committed, and that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." Of course, such requirements cannot be met where the strike in breach of contract is peaceful. Therefore, it is correct to say that in such a situation, because of Norris-LaGuardia, no federal court has the power to issue an injunction. Surely a court cannot be said to have "jurisdiction" when it is powerless to grant the relief sought by the litigant.

The federal courts have been divided on the meaning of the word "jurisdiction" contained in 28 U.S.C. § 1441. Some have held that "jurisdiction" means merely the capacity to entertain a lawsuit even though the court is

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[20] *Chafee*, Some Problems of Equity (1950) (pages 301-303).

powerless to grant the relief sought.[21] Others have held that "jurisdiction" as used in the statute requires both the capacity to entertain the lawsuit and the power to grant all of the relief sought, and accordingly have granted remand in strike injunction cases.[22] These latter cases, making the power to give the relief sought an ingredient in "jurisdiction", are, as pointed out by the Third Circuit in *American Dredging, supra,* consistent with earlier decisions of this Court, including this Court's decision in *General Investment Co.* v. *New York Central* (1926) 271 U.S. 228; 70 L.E. 920, where the Court stated, at page 230:

> "By *jurisdiction* we mean *power to entertain the suit, consider the merits* and *render a binding decision thereon* * * *" (Emphasis added; quoted in *American Dredging, supra,* at page 840)

It is submitted that such cases are also consistent with federal labor policy.

For the reasons set forth in great detail by the Third Circuit in its *American Dredging Co.* decision, and which, therefore, need not be repeated here, it is submitted that

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[21] *Publishers' Assoc.* v. *New York Newspaper Printing Pressmen's Union* (S.D.N.Y.; 1965) 246 F. Supp. 293; *Crestwood Dairy* v. *Kelly* (E.D. N.Y.; 1963) 222 F. Supp. 614; *S. E. Overton Co.* v. *Teamsters* (W.D. Mich.; 1953) 115 F. Supp. 764; *Pocahontas Terminal Corp.* v. *Portland Building Council* (D. Me.; 1950) 93 F. Supp. 217.

[22] *American Dredging Co.* v. *Local 25* (CA 3; 1964) 338 F. (2d) 837; cert. den. (1965) 380 U.S. 935; *Merchant's Refrigerating Co.* v. *Warehouse Union, supra; National Dairy Products Corp.* v. *Heffernan, supra; Hat Corp. of America* v. *United Hatters, supra; Sandsberry* v. *Gulf C. & S. F. Ry., supra; Associated Telephone Co.* v. *CWA, supra; Castle & Cooke Terminals, Ltd.* v. *Local 137, supra; Kroger Co.* v. *Milk and Ice Cream Drivers, et al., supra.*

the district court did not have "jurisdiction" of the instant case, and that for this reason also remand should have been granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment Below

NO. 17207

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

AVCO CORPORATION,
Plaintiff-Appellant,
v.
AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided May 2, 1967.

Before: EDWARDS and CELEBREZZE, Circuit Judges and BATTISTI*, District Judge.

CELEBREZZE, Circuit Judge. The question presented on this appeal is whether an action seeking to enjoin a breach of a no-strike provision in a collective bargaining agreement may be removed from State to Federal Court.

Avco Corporation (Avco) is a Delaware Corporation, qualified to do business in Tennessee. Avco is engaged in

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* Honorable Frank J. Battisti, United States District Judge, Northern District of Ohio, Eastern Division, sitting by designation.

interstate commerce, and its Tennessee manufacturing and assembly plant doing a substantial amount of aircraft structures work has a direct impact on the national defense. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, (Union) is the sole collective bargaining agent for approximately 2,000 production and maintenance employees of Avco's manufacturing plant in Nashville, Tennessee.

A series of work stoppages at the Nashville plant culminated in a plant-wide strike on October 15, 1965. The collective bargaining agreement then in force provided that there would be no work stoppage or strikes, and the bargaining contract further provided for a method of settling grievances, including a provision for binding arbitration.

Avco instituted suit in the Chancery Court for Davidson County, Tennessee, seeking to enjoin the Union from striking, and asking also for general relief. The complaint did not involve any allegation of violence in connection with the strike, and hence no foundation for the employment of state injunctive power under the police power doctrine. After the Chancery Court issued a temporary injunction the Union filed a petition for removal of the cause to the United States District Court. Upon removal, the Union filed a motion to dissolve the temporary injunction, and to dismiss the action upon the alleged ground that the complaint sought, and Avco had been granted, an injunction which the District Court had no power to issue or maintain by reason of the restrictions of the Norris-La Guardia Act. Avco moved to remand the action to the State Court upon the ground that the complaint was not founded on a claim arising under the laws of the United States within the meaning of the Removal Act, but instead was founded

upon breach of contract arising under State law. Avco further maintained that the District Court, by virtue of the Norris-La Guardia Act, did not have original jurisdiction within the meaning of the Removal Act. The District Court dissolved the temporary injunction, but refused to dismiss the action. The motion to remand was denied. Avco appeals.

The question presented here is identical to the question presented in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers*, 338 F.2d 837 (C.A. 3, 1964), cert. den. 380 U.S. 935 (1965). In *American Dredging, supra,* the Court remanded the case to the State Court on the ground that the action, based solely on a State created right, did not come within 28 U.S.C., Section 1441, which permits removal of a civil action to a Federal Court which has jurisdiction under a law of the United States. We decline to follow *American Dredging,* and affirm the judgment of the District Court.

This action was removed to Federal Court pursuant to the provisions of 28 U.S.C., Section 1441(b) which provides, in part:

> "(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Avco maintains that this case does not come within the scope of this removal authorization because its claim does not arise under the laws of the United States and further that Section 4 of the Norris-LaGuardia Act, 29 U.S.C., Section 104, withdraws jurisdiction from Federal Courts to grant the injunctive relief sought in the complaint.

We cannot accept the basic premise of Avco's argument that its action is based solely upon a State created right. Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185,[1] confers jurisdiction upon the District Court without regard to diversity of citizenship or jurisdictional amount to enforce collective bargaining agreements in industries affecting interstate commerce. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), held that Federal substantive law preemptively applies in suits under Section 301, the Court stating:

> "The question then is, what is the substantive law to be applied in suits under Section 301(a)? We conclude that the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national laws. * * *
>
> "Federal interpretation of the Federal law will govern, not State law. Cf. Jerome v. United States, 318 U.S. 101, 194. But State law if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the Federal policy (Citations omitted). Any State law applied, however, will be absorbed as Federal law and will not be an independent source of private rights."

This enunciated principle was reaffirmed in *Teamsters Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), p. 103:

> "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be

---

[1] 29 U.S.C.A., Section 185(a) — Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

> paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by § 301(a) to be decided according to the precepts of federal labor policy."

Thus, according to the findings of the Supreme Court, as enunciated in *Lincoln Mills, supra,* and expanded in *Lucas Flour Co., supra,* all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts. While State courts may have concurrent jurisdiction, they are bound to apply Federal law. *Charles Dowd Box Company* v. *Courtney,* 368 U.S. 502 (1962). The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint.

In view of the express finding in *Lucas Flour, supra,* Avco's contention that its action is founded upon a breach of contract arising under State law is without merit. The action is based upon a violation of a no-strike agreement arising out of a collective bargaining agreement in an industry affecting interstate commerce. Had the action remained in the State Court, the State Court, under the doctrine of *Lincoln Mills* and *Lucas Flour,* was bound to apply Federal and not State law.

Finding that Avco's claim is one arising under the laws of the United States, we next consider whether Section 4 of the Norris-La Guardia Act, 29 U.S.C.A., Section 104, withdrew jurisdiction from Federal Courts.

> "Section 4 of the Norris-La Guardia Act provides, in part:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such disputes (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> "(A) Ceasing or refusing to perform any work or to remain in any relation of employment: * * *."

We do not think "jurisdiction" has the same meaning in Section 4 of the Norris-La Guardia Act as it does in Section 301 of the Labor Management Relations Act. The Norris-La Guardia Act does not deny to Federal Courts jurisdiction over the parties or the subject matter. The Federal Courts are denied the power to grant injunctive relief under the provision of Section 4 of the Act, and permitted to grant injunctive relief under the provision of Section 7 of the Act. The Norris-La Guardia Act does not limit the power of the Court to entertain the suit. As stated by the District Court, "the mere fact that a prohibited labor injunction is among the remedies sought does not mean that a District Court lacks original jurisdiction over the cause of action for the purposes of awarding other relief."

The loss of the power to grant certain equitable remedies does not mean Federal Courts have lost jurisdiction over the subject matter or parties.

In *Pusey and Jones Co.* v. *Hanssen*, 261 U.S. 491, 500 (1923), Mr. Justice Brandeis said:

> "The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court (citations omitted). The objection may * * * be taken by the court of its

> own motion. But, unlike lack of jurisdiction as a federal court, (citations omitted) lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject matter of the suit is of a class of which equity has jurisdiction."

Mr. Justice Stone said in *DiGiovanni* v. *Camden Fire Insurance Assoc.*, 296 U.S. 64, 69 (1935):

> "Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give."

Whether "jurisdiction" in Section 4 means equity jurisdiction or jurisdiction over the subject matter has been fully considered by Professor Chafee, *Some Problems of Equity,* Chapters 8 and 9 (1950). In commenting on congressional limitation on federal judicial power by the Norris-La Guardia Act, Professor Chafee said:

> "Everybody in this four-sided row among the Justices took it for granted that 'no court * * * shall have jurisdiction * * *' meant 'no court shall have power * * *' yet clearly the District Judge had jurisdiction over the parties, and * * * he also had jurisdiction over the subject matter. The District Court did have power to decide labor disputes, and it could at least award damages for acts which, the statute said, were not to be enjoined. This being so, nothing further was required to give that Court power to act, which includes power to act wrongly * * *. In short, the [Norris-La Guardia] Act says, in effect, 'no court shall have equity jurisdiction * * *', and lack of equity jurisdiction * * * is not lack of power." (Page 368).

Under Section 7 of the Norris-La Guardia Act, Federal Courts may grant injunctions under certain enumerated circumstances. Professor Chafee cogently argued that if Federal Courts have no subject matter jurisdiction, then how can the Court sit without jurisdiction until certain facts are proved and then decide whether it has the power to act? The answer is, jurisdiction attaches from the beginning or not at all.

The strike against Avco gave rise to a single cause of action for which any number of different remedies were available. See *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6 (1951), where the Supreme Court defined cause of action as being predicated on a single wrong to plaintiff for which relief is sought. While the injunctive remedy has played an important part in the history of labor law, such close relationship between this effective remedy and the cause of action does not mean the two are coextensive. Here the complaint stated a single cause of action. The relief prayed for was an injunction and general relief. If Avco had not asked for general relief, it would have been entitled to any appropriate relief, other than an injunction, under Rule 54(c), Federal Rules of Civil Procedure.[2] Under the Rules of Civil Procedure, federal courts in their discretion may grant relief of a kind not requested in the

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[2] Rule 54(c), Rules of Civil Procedure. Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

pleading of either party. *Mercury Oil Refining Co.* v. *Oil Workers Int. Union, CIO,* 187 F.2 980.

In *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Supreme Court held that Section 301 had not so narrowed the provisions of Section 4 as to permit injunctions growing out of a labor dispute. The Court dismissed the count requesting an injunction, and the District Court, having jurisdiction over the parties and the subject matter, was free to go to trial on the merits of the count requesting damages.

While *Sinclair* v. *Atkinson, supra,* rests on plain language and legislative purpose, the Court said, at page 303:

> "* * * Section 301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-La Guardia Act."

Though Section 4 specifically applies only to Federal Courts, there was, nevertheless, a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law.[3] The effect of Section 4 was not to authorize State Courts to grant injunctive relief, they already had that power. However, the substantive powers of the States to determine labor law and labor policy in labor disputes arising out of collective bargaining agreements in indus-

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[3] An employer may obtain an order directing a Union to comply with its agreement to arbitrate. A strike in the face of such an order could result in contempt proceedings. This alternative remedy is referred to in *Sinclair Refining Co.* v. *Atkinson, supra,* page 214 and page 227, Fn. 23.

tries affecting interstate commerce has now been taken away by Federal law.

Federal Courts are solely responsible for developing a single, consistent body of Federal labor law. The Supreme Court said in *Teamsters Local 174* v. *Lucas Flour Co., supra,* page 103:

> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' (Citations omitted). The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation."

If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity of application, the remedies available in State Courts are limited to the remedies available under Federal law.

Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The Congress has declared that injunctions shall not issue to restrain peaceful picketing.

The judgment of the District Court denying the motion to remand is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,207

AVCO CORPORATION,
Plaintiff-Appellant

vs.

AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Defendants-Appellees.

Before EDWARDS and CELEBREZZE, *Circuit Judges*, and BATTISTI, *District Judge*.

JUDGMENT.

APPEAL from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
Carl W. Reuss
Clerk

A True Copy.
Attest:

.....
Carl W. Reuss, Clerk

Issued as Mandate:
COSTS: NONE

Filing fee .....$———

Printing .....$———

———

Total .....$———

APPENDIX B

Statutes Involved

Section 1441 of the Removal Act of 1948 (28 U.S.C. §1441, 62 Stat. 937) provides:

§1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1447 of the Removal Act of 1948 (28 U.S.C. §1447, 62 Stat. 939, amended May 24, 1949, 63 Stat. 102, and July 2, 1964, 78 Stat. 266) provides in relevant part:

§1447. Procedure after removal generally

* * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

* * *

Section 4 of the Norris-LaGuardia Act of 1932 (29 U.S.C. §104, 47 Stat. 70) provides in relevant part:

§104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

* * *

Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. §185, 61 Stat. 156) provides:

§185. Suits by and against labor organizations — Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

SUPREME COURT, U. S.

FILED

NOV 24 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 445.

AVCO CORPORATION,

v. *Petitioner,*

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET. AL. *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF LABOR RELATIONS COMMITTEE OF COUNCIL OF STATE CHAMBERS OF COMMERCE, PHILADELPHIA MARINE TRADE ASSOCIATION AND AMERICAN DREDGING COMPANY, AMICI CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 445.

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF LABOR RELATIONS COMMITTEE OF COUNCIL OF STATE CHAMBERS OF COMMERCE, PHILADELPHIA MARINE TRADE ASSOCIATION AND AMERICAN DREDGING COMPANY, AMICI CURIAE.

STATEMENT OF INTEREST.

The Council of State Chambers of Commerce is a national organization of thiry-two state chambers of commerce. The constituencies of its member state chambers

cover over 50,000 firms in every type of business. The Council's Labor Relations Committee * is the Council's coordinating agency for the development of policies of national importance in the labor-management relations field.

Philadelphia Marine Trade Association is an association of seventy members who are engaged as steamship lines, steamship agents, stevedores, marine terminal operators and in other maritime activities in the port of Philadelphia. The Association is the collective bargaining agency for all of its members with respect to the employment of over 4,000 longshoremen, carloaders, clerks and checkers, timekeepers, carpenters, ship cleaners and other maritime workers on the Philadelphia waterfront.

American Dredging Company is an individual employer engaged in the business of dredging in navigable waters, land reclamation and similar operations.

The Principal Issue.

At the root of this case is the question whether the limitations of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. 101 *et seq.*, upon the jurisdiction of federal courts to grant injunctions in labor disputes are to be extended to state courts in the context of union breaches of the no-strike obligations of collective bargaining agreements, and, specifically, whether this is to be accomplished indirectly by the procedural device of removal.

In proceedings before a state court, petitioner, Avco Corp., obtained a temporary injunction restraining respondent union, its officers, and others from engaging in strikes alleged to be in breach of the no-strike obligation of the collective bargaining agreement in effect between Avco and the union. Thereafter, respondents filed a petition to remove the action to the United States District Court for

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* This brief *amici curiae* is filed pursuant to consents, given by all parties to the above titled cases, mailed to the Clerk of this Court on November 15, 1967.

the Middle District of Tennessee under 28 U. S. C. 1441(b).[1] The district court denied the motion of Avco to remand and granted respondents' motion to dissolve the temporary injunction. Inasmuch as this Court, in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962), held that § 4 of the Norris-LaGuardia Act[2] continues to deprive federal courts of jurisdiction to enjoin breaches of no-strike agreements, the result of these proceedings was to confine the employer to the federal court, which could not grant the important relief it sought, and to deny it access to the state court, which could grant that relief.

The narrow issue framed in this case, whether the action should have been remanded to the state court,[3] necessarily involves a question of great importance to the peaceful conduct of labor-management relations. By allowing the tactic of removal, the courts below have denied the existence of any power in state courts to grant injunc-

1. 62 Stat. 937 (1948). "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . ."

2. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

* * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * *

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this title."

3. The question whether the district court properly dissolved the state court temporary injunction is not material if the action should have been remanded.

tions restraining strikes in breach of collective bargaining agreements, thus indirectly extending the Norris-LaGuardia Act to state courts.

Basis of Interest.

The Labor Relations Committee of the Council of State Chambers of Commerce is participating in this case in the interest of business generally and because of its view that the result of the adoption of the Court of Appeals' decision in this case would be to leave employers with inadequate means for effectively enforcing no-strike clauses in collective bargaining agreements. The existence of any power in state courts to enjoin breaches of no-strike agreements is of obvious interest to thousands of employers throughout the country. Virtually all major collective bargaining agreements contain no-strike restrictions. Most of these restrictions are absolute. The bulk of those which limit the ban tie it to disputes subject to grievance and/or arbitration procedures,[4] thus reflecting the coordinate roles of the no-strike agreement and the arbitration process in insuring stable industrial relations. However, despite the widespread use of the no-strike agreement, work stoppages during the terms of collective bargaining agreements continue to be a major problem. During each of the six years that the Bureau of Labor Statistics has published records on this subject,[5] approximately one-third of all work stoppages have occurred during the term of an existing collective bargaining agreement.[6]

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4. *Bureau of Labor Statistics, U. S. Dept. of Labor, Major Collective Bargaining Agreements—Arbitration Procedures* 83-94 (Bulletin No. 1425-6, 1966).

5. See *Bureau of Labor Statistics, U. S. Dept. of Labor, Analysis of Work Stoppages, 1960* 5 (Bulletin No. 1302).

6. *Bureau of Labor Statistics, U. S. Dept. of Labor, Analysis of Work Stoppages,* (Bulletin Nos. 1339, p. 9, *1961;* 1381, p. 9, *1962;* 1420, p. 12, *1963;* 1460, p. 12, *1964;* 1525, p. 11, *1965*); *Bureau of Labor Statistics, U. S. Dept. of Labor, Work Stoppages in 1966,* 4 (Summary Release July 1967).

Injunctive relief is an important means of minimizing this serious problem by insuring compliance with contractual no-strike obligations and providing the industrial peace which they are designed to achieve.

The interest of Philadelphia Marine Trade Association results from the nature of the business of its members and their experience with the no-strike clauses of their collective bargaining agreements.

The maritime industry on the east coast and the employers represented by Philadelphia Marine Trade Association have long been plagued by highly volatile labor relations both aboard ships and at shore side. Because of the nature of their business, maritime employers are particularly vulnerable to unannounced work stoppages and wildcat strikes. To meet this problem, each of the collective bargaining agreements between Philadelphia Marine Trade Association and the various locals of the International Longshoremen's Association provides for the expeditious resolution of grievances by impartial arbitration in exchange for labor's promise not to engage in any strikes or work stoppages during its term.

The great losses suffered by maritime employers from strikes and work stoppages in violation of the no-strike clauses in their collective bargaining agreements make it essential that these no-strike agreements be specifically enforceable. The damage remedy is particularly inadequate for maritime employers since the unions in this industry are usually without sufficient assets to satisfy a judgment.

American Dredging Company has a very special interest in the issues and outcome of this case. American was the employer in *American Dredging Co. v. Local 25, Operating Engineers,* 338 F. 2d 837 (3rd Cir. 1964), *cert. denied,* 380 U. S. 935 (1965), which arose out of a strike in breach of the no-strike provisions of its collective bargaining agreements with Local 25. After the strike began, American obtained a preliminary injunction of limited

duration in a state court. Four days later, before the injunction could be extended after hearing, the union removed the action to the federal district court which denied American's motion to remand. Because, under *Sinclair Refining Co. v. Atkinson, supra,* the district court could not grant an injunction, American was left without any further possibility of injunctive relief. American appealed to the Court of Appeals for the Third Circuit which held that the action was improperly removed and should have been remanded because the district court did not have original jurisdiction. This Court denied certiorari.

The strike which precipitated the foregoing proceedings continued for over two months while the matter was pending in the district court and after the appeal was filed. Prior to this strike, American had been plagued by a history of contractually-prohibited work stoppages by Local 25. However, since the decision of the Court of Appeals, American has enjoyed a period of stable labor relations. When the term of the collective bargaining agreements involved in the litigation expired, American and Local 25 entered into agreements which contained the same no-strike obligations. Since the decision of the Court of Appeals, disputes have been resolved through the grievance and arbitration procedures of the agreements, and not through economic combat as before. American is vitally interested that this condition continue.

SUMMARY OF ARGUMENT.

I.

Legislative history clearly demonstrates that Congress, following a fundamental purpose of creating industrial peace and stability, enacted § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185, to assure the enforcement of collective bargaining agreements and, particularly, to provide an effective means of enforcing no-strike obligations undertaken by unions in such agreements. Although § 301 gives federal courts jurisdiction of actions for the violation of collective bargaining agreements, Congress intended to build upon existing state machinery, including the injunctive remedy in those states where it was available, and to give state courts concurrent jurisdiction.

In *Textile Workers v. Lincoln Mills,* 353 U. S. 448, 456 (1957), this Court held that the substantive law to be applied in suits under § 301 is "federal labor law, which the courts must fashion from the policy of our national labor laws." As this Court recognized in *Sinclair Refining Co. v. Atkinson,* 370 U. S. 195 (1962), this judicial mandate contains its own inherent limitations. It was there held that the express terms of the Norris-LaGuardia Act continued to deprive federal courts of jurisdiction to enjoin strikes in breach of no-strike clauses, despite the basic congressional policy reflected in § 301 of assuring union responsibility for the observance of the no-strike obligations assumed in collective bargaining agreements. Because Congress, in enacting § 301, had considered repeal or amendment of Norris-LaGuardia to allow such injunctions and had specifically declined to do so, this Court concluded that it could not use its power under § 301 to fashion federal labor law which would have disregarded that specific expression of legislative intent.

Sinclair does not mean that the Norris-LaGuardia Act, which is limited in its terms to federal courts, is now part of the federal labor policy to be applied in all suits under § 301. The decision in *Sinclair* was a matter of compelled statutory construction and not an application of the judicial process of fashioning national labor law.

As this Court, in *Sinclair*, could not disregard Congress' intention not to repeal or alter Norris-LaGuardia, it should not, in this case, deny the injunctive remedy to state courts and thus disregard Congress' intent in § 301 to build upon existing state machinery in order to provide more effective means for enforcement of contractual no-strike obligations. To do otherwise, is to leave employers in a worse position with respect to enforcement of collective bargaining agreements than they were before the enactment of § 301.

The requirement that there be uniformity in the substantive labor law to be fashioned under § 301, as set forth in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U. S. 95 (1962), provides no warrant for concluding that state courts are deprived of this important remedy merely because federal courts are denied it. Uniformity is necessary only to prevent uncertainty as to the meaning of contract language from having a disruptive effect upon the formation of the collective bargaining agreement and the private settlement of disputes under it. Lack of uniformity does not have this effect when these consensual processes have broken down. Indeed, in the area where uniformity is not required, federal labor law endorses the application of state law which comports with federal labor policy. *Int'l. Union, United Automobile, Aerospace, & Agricultural Implement Workers (UAW) v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966). That state court injunctions remain available to compel the observance of no-strike agreements is not only consistent with the basic policies of § 301 but required by the express intentions of Congress. Not only does an effectively-enforceable no-strike agreement directly

provide labor peace and stability, but its availability encourages management to enter into collective agreements with labor and encourages labor to use the arbitration machinery of such agreements to resolve industrial disputes.

II.

The removal statute, 28 U. S. C. § 1441, should not be used to frustrate state court injunctive power which is so vitally a part of § 301.

This action was not removeable because the Norris-LaGuardia Act deprived the federal district court of original jurisdiction over it. "Original jurisdiction" in the removal statute must be interpreted in light of the statutes through which Congress has exercised its constitutional power to limit and define the jurisdiction of the lower federal courts. Since Norris-LaGuardia is such a statute, it precluded removal in this case.

Moreover, jurisdiction means power to entertain a suit, consider its merits and render a binding decision thereon. Plainly, if a district court is required under *Sinclair* to dismiss for lack of jurisdiction an action originally brought there, it cannot accept jurisdiction on removal from a state court and retain the case without power to do any more than hold it in suspension and eventually dismiss it.

ARGUMENT.

I. The Fundamental Policies of Section 301 Not Only Permit, But Endorse, State Court Injunctive Relief Against Breaches of the No-strike Obligations of Collective Bargaining Agreements.

It was not until the enactment of § 301 of the Labor Management Relations Act of 1947 that the present issue of state court injunction power became a matter of concern to the federal courts.

The brief language of § 301 that labor organizations may be sued as entities and that suits to enforce collective bargaining agreements may be brought in federal courts does not, itself, cast any substantial light upon the important issue in this case, and it is to the purposes of Congress, as reflected in the legislative history and elucidated by this Court, that one must look for guidance.

Section 301 was enacted as part of a body of legislation which reflected a general congressional judgment that existing law and its administration had been too much weighted in favor of labor unions and that equalizing reform was necessary to cure certain abuses, to prevent industrial strife and to encourage the resolution of industrial disputes by private agreement. See S. Rep. No. 105, 80th Cong. 1st Sess. 1, 2, I Leg. Hist. 407, 408; H. R. Rep. No. 245, 80th Cong. 1st Sess. 3, 4, I Leg. Hist. 294, 295; Comparison of National Labor Relations Act of 1935 with Labor Management Relations Act of 1947, II Leg. Hist. 1661-1680.

In this context, § 301 was intended to assure the enforcement of collective bargaining agreements, and particularly to provide an effective method of enforcing no-strike obligations undertaken by unions in such agreements. This objective is clearly stated in the Senate Committee Report:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize

industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce." S. Rep. No. 105, 80th Congress, 1st Sess. 16, I Legis. Hist. 422.

In *Textile Workers v. Lincoln Mills,* 353 U. S. 448 (1957), this Court held that § 301 did not merely create a new area of jurisdiction for the federal courts but expressed a federal policy that industrial peace can best be obtained by judicial enforcement of collective bargaining agreements. *Id.* at 455. This Court then stated that the substantive law to be applied in suits under § 301 is "federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. The outlines of this process were set forth as follows:

"The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will ef-

fectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.* at 457.

In fashioning the law under Section 301 the courts have been careful to effectuate Congress' basic purpose of insuring industrial peace through the use of the no-strike clause. The host of decided cases which enhance and promote the private arbitration process[7] reflect judicial respect for, and concern to effectuate, this basic purpose. Arbitration has become the preferred instrument of federal labor policy because it is the *quid pro quo* for the no-strike agreement. *Textile Workers v. Lincoln Mills,* 353 U. S. 448, 453, 455 (1957). Indeed, the arbitration process and effective enforcement of the no-strike agreement operate in tandem to provide industrial peace and stability and to promote the collective bargaining process.[8] The availability of an effectively enforceable no-strike clause compels labor to utilize the peaceful machinery of arbitration for the resolution of disputes.

The overriding congressional purpose to promote agreements not to strike is further emphasized by the holding of this Court in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U. S. 95 (1962) that a no-strike agreement may be inferred from an agreement to arbitrate.

At the same time, in *Dowd Box Co. v. Courtney,* 368 U. S. 502 (1962), this Court recognized that Congress intended that the state courts should have a concurrent role in advancing the fundamental policy of § 301 and that Congress intended to enhance, rather than displace, state machinery for enforcement of collective bargaining agreements. This Court stated that:

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7. *E.g., United Steelworkers v. American Manufacturing Co.,* 363 U. S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960).

8. See *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* at 583.

"Congress manifested its complete awareness of both the existence and limitations of state court remedies for violations of collective agreements."

* * *

"The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations."

* * *

"It is obvious that Congress did not intend this remedial measure to destroy the foundation upon which it was built." *Id.* at 510, 511, 513.

In the same vein, the legislative history contains a statement by Senator Taft which supports the conclusion that Congress did not intend to deny state courts the use of the injunction remedy. At committee hearings on the Case Bill, a predecessor of the Labor Management Relations Act of 1947, Senator Taft, whom this Court has described as "one of the authors of this legislation that bore his name" and "a man generally regarded in the Senate as a very able lawyer and one upon whom the Senate could rely for accurate, forthright explanations of legislation with which he was connected,"[9] said with reference to a provision of that bill which was similar to § 301:

"This [bill] would carry to a civil injunction process if it were one generally usable under the laws of equity, I think, when you say it is binding and enforceable; whatever the equitable remedies might be in that State, or might be considered proper by the

9. *Sinclair Refining Co. v. Atkinson, supra,* at 208, 209.

court, could be used." Hearings on H. R. 4908 (Labor Disputes Act of 1946) before a Subcommittee of the Senate Committee on Education and Labor, 79th Congress, 2d. Sess. 11 (1946).[10]

Labor legislation is peculiarly the product of legislative compromise of strongly held views. *NLRB v. Allis-Chalmers Mfg. Co.*, 87 S. Ct. 2001, 2006 (1967). In *Sinclair Refining Co. v. Atkinson*, this Court held that the express language of the Norris-LaGuardia Act continued to deprive federal courts of jurisdiction to enjoin strikes in breach of no-strike clauses, despite the basic congressional policy reflected in § 301 of assuring union responsibility for the observance of the no-strike obligations assumed in collective bargaining agreements.

In reaching that conclusion this Court was careful to mark the limit of judicial power to fashion uniform federal labor law under § 301. The absolute prohibitions clearly expressed in Norris-LaGuardia, combined with unmistakable, specific expressions of congressional intent not to alter or repeal Norris-LaGuardia, prevented the Court from using § 301 to fashion federal labor law which would have accommodated out of existence the limitation imposed by Congress upon the jurisdiction of federal courts by Norris-LaGuardia. By the same token, it is equally clear that the dominant Congressional purposes in the enactment of § 301 are not to be frustrated by extending Norris-LaGuardia, an act expressly limited by its terms to the jurisdiction of federal courts and specifically intended not to affect state courts,[11]

10. Like § 301 as enacted and unlike the bill initially passed by the House in the 80th Congress (see *Sinclair*, 370 U. S. at 206), the Case Bill did not purport to repeal or amend Norris-LaGuardia with respect to breach of contract strikes—although it did specifically do so with respect to violence and intimidation. Hearings on H. R. 4908, *supra*, at 4 & 5.

11. *E.g.*, 75 CONG. REC. 5464 (remarks of Representative Michener) State courts are "at liberty to issue any type of an injunction which is permitted in the State where the court has jurisdiction." *Id.* at 5478 (remarks of Representative LaGuardia) "The

to limit the powers of state courts under the guise of judicially-fashioned federal labor law.

There is nothing in *Sinclair* which can be construed to extend Norris-LaGuardia or suggest that federal labor law or policy prohibits all courts from enjoining breaches of no-strike agreements. The *Sinclair* decision itself was carefully tailored to avoid misinterpretation in these respects. Repeated references to federal or United States courts clearly indicate the limited application of the decision. The question before the Court was resolved as a matter of compelled statutory construction and not through the judicial process of fashioning national labor law. The Court read the strict terms of the Norris-LaGuardia Act as requiring a departure from the federal labor policy of promoting industrial peace through enforcement of collective bargaining agreements, even though that policy might be advanced by the availability of the injunctive remedy. And the Court expressly held that the action for injunctive relief was properly dismissed "for lack of jurisdiction."

In enacting § 301, Congress was aware of the state court remedies available for enforcement of collective bargaining agreements.[12] It specifically considered the relation between Norris-LaGuardia and its new legislation. Yet Congress manifested no desire either to restrict state remedies or extend Norris-LaGuardia to state courts. In the absence

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bill does not take one iota of jurisdiction—because we have not the power—from the State courts and does not change any State law."

Norris-LaGuardia was expressly enacted under Congress' constitutional authority to limit and define the jurisdiction of the lower federal courts. See note 22, *infra*, and accompanying text. Its limited scope is further suggested by the fact that much congressional discussion concerned abuses by federal judges. *E.g.*, S. Rep. 163, 72d Cong. 1st Sess. 18; 75 Cong. Rec. 5478 (remarks of Representative LaGuardia) "Gentlemen, there is one reason why this legislation is before Congress. . . . Disobedience of the law on the part of a few Federal Judges." See *Sinclair Refining Co. v. Atkinson*, *supra*, 370 U. S. at 219 & n. 5 (Brennan, J., dissenting).

12. *Dowd Box Co. v. Courtney*, 368 U. S. 502, 510, 511, 513 (1962), quoted at p. 13, *supra*.

of such manifestations, and in the face of affirmative congressional intent to enhance the enforcement of collective bargaining agreements and to insure union responsibility to the no-strike obligations of such agreements, there is no warrant for concluding that federal labor law or policy denies the injunctive remedy to state courts. See *Shaw Electric Co., Inc. v. I. B. E. W. Local Union No. 98,* 418 Pa. 1, 13, 208 A. 2d 769, 775-76 (1965).

Section 301 does not embody or reflect any policy that requires state courts enforcing rights under collective bargaining agreements to withhold injunctive relief against union failure to comply with contractual no-strike obligations. On the contrary, § 301 was designed to enhance the enforcement of collective bargaining agreements and, in particular, to insure union responsibility to the no-strike obligations of such agreements by building upon existing state machinery. As Justice Traynor of the California Supreme Court aptly stated:

> "We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301." *McCarroll v. Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45, 63-64, 315 P. 2d 322, 332 (1957), *cert. denied,* 355 U. S. 932 (1958).

In enacting Section 301, Congress recognized that the collective bargaining agreement could best serve the cause of industrial peace if it were of equal benefit to both labor and management and, accordingly, § 301 was designed to function as an equalizing instrument. Inasmuch as this Court has held that an employer's contractual obligation to arbitrate is specifically enforceable,[13] the equalizing pur-

13. *Textile Workers v. Lincoln Mills,* 353 U. S. 448 (1957).

pose of § 301 requires that a union's corresponding contractual obligation not to strike should also be specifically enforceable in those states where specific enforcement is available.

Any interpretation of Norris-LaGuardia or *Sinclair* which would deny state courts the right to enjoin breaches of contractual no-strike obligations is clearly at odds with the fundamental purpose of § 301 to encourage industrial peace by assuring the enforceability of no-strike obligations. In the overwhelming majority of cases, the state court injunctive remedy, in those states where it is available, is the most effective means of accomplishing this. By the very nature of equity jurisprudence, state courts allow it because other remedies are inadequate. The damage suit must await its turn on crowded court dockets. Its pendency may often serve to exacerbate labor-management relations. If the employer is not forced to dismiss it in the interest of future harmony, then the vagaries of the jury, the difficulty of measuring damages such as permanent loss of customers, and the insufficiency of the union treasury makes adequate recompense extremely rare. Because it is often such an illusory remedy, neither the availability nor institution of a damage suit can prevent or stop industrial strife and economic warfare in any significant manner.

In most situations, specific enforcement of arbitrators' awards which prohibit breach of contract strikes is likewise an impractical alternative. This is because the overwhelming majority of collective bargaining agreements provide an *ad hoc* method of selecting arbitrators which results in many weeks or months delay before an arbitrator can be selected, a hearing can be held and an award can be rendered, rather than a permanent umpire who can render an almost immediate award.[14] In addition, some collective

14. See *Bureau of Labor Statistics, U. S. Department of Labor, Major Collective Bargaining Agreements—Arbitration Procedures* 33-47 (Bulletin No. 1425-6, 1966).

agreements give the employer only limited access or no access to the arbitration procedure. See *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 243 (1962).

Despite the clear congressional purpose to provide adequate means of enforcing compliance with contractual no-strike obligations, the Court below interpreted the uniformity principle expressed in *Local 174, Teamsters v. Lucas Flour*, 369 U. S. 95 (1962), as requiring that state courts be deprived of the injunction remedy merely because this Court has held that federal courts are deprived of that remedy. Only blind adherence to "uniformity" can support such a result.

In *Lucas Flour*, this Court held that a state court was not free to apply its own individualized local law to determine whether a no-strike agreement was to be implied from an express agreement to arbitrate. Although the Court declared that uniform federal substantive labor law must be paramount in § 301 suits, it did so for reasons which are totally inapplicable to the present question.

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." *Id.* at 103, 104.

The area for application of uniform federal labor law was further elucidated by this Court in *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers (UAW) v. Hoosier Cardinal Corp.*, 383 U. S. 696 (1966). In declining to create a uniform statute of limitations for suits under § 301 and in holding that state statutes of limitations governed, this Court reiterated the grounds for uniformity set forth in *Lucas Flour* and further stated that:

> "The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." 383 U. S. at 702, 703.

After holding that the state statute of limitations applied, this Court then affirmed the lower courts' decisions that the state's six year oral contract rule, rather than its 20 year written contract rule, applied, particularly because it comported with a goal of federal policy, as reflected in the unfair labor practices segment of the Labor Management Relations Act, that there should be a relatively rapid disposition of labor disputes.

The impact of *Lucas Flour* and *Hoosier Cardinal* upon the momentous question in this case is large and plain. (1) Like the question of applicable statute of limitations, the question whether a contract violation may be enjoined is not a subject requiring uniform law since diverse answers

to the question will not result in uncertainty as to the meaning of particular contract terms which would otherwise result from dual bodies of law, state and federal.[15] (2) When the consensual processes of collective bargaining and private settlement of disputes have broken down, as they have when a court is asked to enjoin contract violations, lack of uniformity is unlikely to materially frustrate any significant goal of federal labor policy. The uniformity requirement is not threatened or impaired because state courts can give a more effective remedy.[16] (3) In the area where uniformity is not required, federal labor law endorses the application of state law which comports with federal labor policy. As the shorter statute of limitations comports with the federal labor policy that there be a relatively rapid disposition of labor disputes, so does the state injunctive remedy comport with the fundamental congressional purpose to assure the enforceability of no-strike agreements.[17]

It has been suggested that the availability of the injunction remedy in state courts will make them the preferred forum for litigation of labor disputes. However, there is no evidence that the courts of those states which permit injunctions have, in fact, become a "preferred forum"; nor would the number of cases in the federal courts involving breaches of collective bargaining agreements suggest that federal courts are being avoided. Although the importance of the injunctive remedy cannot be overemphasized, the great quantity of litigation under § 301

15. "Surely, the interpretation of contractual clauses does not hinge on the form of relief to be granted." *Shaw Electric Co. v. I. B. E. W. Local Union No. 98,* 418 Pa. 1, 11, 208 A. 2d 769, 775 (1965).

16. *McCarroll v. Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45, 64, 315 P. 2d 322, 332-33 (1957), *cert. denied,* 355 U. S. 932 (1958).

17. See *Textile Workers v. Lincoln Mills, supra* at 457. "'[S]tate law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy."

involves the arbitration process and problems other than specific enforcement of no-strike agreements.

There is also no merit to any concern that the development of uniform substantive law will be undermined because litigation may gravitate to the state courts because they can grant a more effective remedy. In *Dowd Box Co. v. Courtney*, 368 U. S. 502 (1962), this Court recognized that the concurrent role which Congress intended for state courts was perfectly consistent with the paramount role of federal labor law.

> "It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Id.* at 514.[18]

Lucas Flour, supra, and *Smith v. Evening News*, 371 U. S. 195 (1962), are illustrations of how this type of federalism operates.

It would be indeed strange that Congress would have desired that federal forums be preferred at the cost of totally eliminating, in those states where it is available, the best means of insuring industrial peace and stability, for the injunction remedy does not only directly halt economic warfare once it has broken out, but its availability encourages management to enter into collective agreements with labor and encourages labor to use the arbitration machinery of such agreements to resolve industrial disputes.

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18. *Cf., Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511, 518-19 (1955).

II. The District Court Did Not Have Original Jurisdiction of Plaintiff's Action for Injunctive Relief Against Violations of the No-Strike Clause of the Parties Collective Bargaining Agreement.

No action is removable to a federal district court under 28 U. S. C. § 1441 unless it is within the "original jurisdiction" of the federal district courts. Any construction of this removal statute which uses § 301 to give the federal courts original jurisdiction and thus permit removal of an employer's action for injunctive relief against no-strike clause violations only to dismiss the complaint for lack of jurisdiction under the Norris-LaGuardia Act, as required by *Sinclair,* would defeat the essential purposes of § 301 as expressed by Congress and elucidated by this Court. Such a result would debilitate, rather than enhance, the remedies available to promote industrial peace by enforcement of collective bargaining agreements.

As the Court pointedly stated in *American Dredging Co. v. Local 25, Operating Engineers,* 338 F. 2d 837 (3d Cir. 1964), *cert. denied,* 380 U. S. 935 (1965):

> "It has been settled for almost a century that federal statutes should be construed and applied so as to avoid 'injustice' or 'absurd consequence.'"
>
> • • •
>
> "In a removal proceeding under § 1441 that statute must be harnessed in a real sense to the specific federal law (here § 301(a)) relied upon as conferring original jurisdiction upon the District Court.
>
> To hold that § 1441 may be recruited to defeat the Congressional purpose in enacting § 301(a) would be to mock reason and to deny justice. . . ." *Id.* at 842, 848.

Although the purpose of the removal statute is unclear, it was never intended to entirely foreclose remedies legitimately available in state courts,[19] much less to defeat affirmative congressional policy within Congress' constitutional commerce or other regulatory powers.

Only a most abstract definition of jurisdiction would require the conclusion that, despite the express terms of Norris-LaGuardia, federal district courts have original jurisdiction of an employer's action to enjoin breaches of a no-strike agreement. The jurisdiction which this Court found lacking in *Sinclair* and explicit in the text and purpose of the Norris-LaGuardia Act is jurisdiction in the fullest sense of the word. It was the intent of the Norris-LaGuardia Act to take the federal courts out of the business of issuing injunctions against strikes by depriving them of jurisdiction at the threshold of the case, leaving no room for temporizing or whittling away at the restriction. See *Sinclair Refining Co. v. Atkinson, supra,* at 202; *Marine Cooks & Stewards v. Panama SS. Co.,* 362 U. S. 365, 369 (1960); *Frankfurter & Greene, The Labor Injunction,* 199-202 (1930). The jurisdiction contemplated by Congress was the literal, practical concept of power to consider the merits of a case.

This practical view of jurisdiction was clearly set forth in *American Dredging Co. v. Local 25, Operating Engineers, supra:*

> "To say then that a District Court has *subject matter jurisdiction* of a cause of action, so as to authorize it to *take cognizance* of it under the provisions of the Removal Statute, when it does not in the first place have jurisdiction to entertain and decide it upon its merits, is to give sanction to an exercise in futility.

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19. 113 U. PA. L. REV. 1096, 1098 (1965).

> "Or putting it another way, for a court to say that it has *subject matter jurisdiction* enabling it to take cognizance of a case, and then to rule that although the case has merit, it is without judicial power, viz., jurisdiction, to grant a final decree on the merits, is to pursue, what Mr. Justice Frankurter once characterized, in another context, a 'fox-hunting theory of justice that ought to make Bentham's skeleton rattle,'. . . ." *Id.* at 842.[20]

Moreover, the words "original jurisdiction" in the removal statute must necessarily refer to the jurisdiction of the federal district courts as that jurisdiction has been set forth in the various statutes by which Congress has exercised its constitutional power to define the jurisdiction of courts of the United States.

In enacting Norris-LaGuardia, Congress was acting under that constitutional power.[21] The legislative history[22] and the very language of the Act are most explicit on this point. Norris-LaGuardia is entitled "An Act to Amend the Judicial Code and to Define and Limit the Jurisdiction of Courts Sitting in Equity, and for Other Purposes." 47 Stat. 70 (1932). Section 13(d) of the Act defines "court of the United States" as "any court of the United States

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20. The Court relied on *Minnesota v. Northern Securities Co.*, 194 U. S. 48 (1904) where this Court, in holding an action to have been improperly removed, stated:

> "If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court *from exercising an authority not conferred upon it by statute.*"
>
> "We proceed, therefore, to inquire whether the circuit court *could take cognizance of this case* upon removal from the state court, and *make a final decree upon the merits.*" *Id.* at 63 (emphasis added by Court of Appeals).

21. *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 63, 315 P. 2d 322, 332 (1957), *cert. denied*, 355 U. S. 932 (1958).

22. H. R. REP. No. 669, 72d Cong., 1st Sess. 3, 11, 12 (1932); 75 CONG. REC. 4626 (Remarks of Sen. Blaine).

whose jurisdiction has been or may be conferred or defined or limited by Act of Congress. . . ." This Court has characterized Congress' action in passing this legislation as "[an exercise of] its plenary control over the jurisdiction of the federal courts." *Brotherhood of Ry. Trainmen v. Toledo, Pac. & W. R. R.*, 321 U. S. 50, 63-64 (1943); *cf., Lockert v. Phillips,* 319 U. S. 182 (1943). The removal statute cannot be construed in a vacuum; it must be construed in light of Norris-LaGuardia. When so construed, it is plain that federal courts in labor injunction cases lack original jurisdiction by virtue of Norris-LaGuardia.

With state court injunctive power so vitally a part of § 301, it was particularly improper for the Court below to have recruited appellant's prayer for general relief and F. R. C. P. 54(c) [23] in order to characterize the action as one for relief other than an injunction so that the action might be brought within the scope of the removal statute.

By filing their motion to dismiss, even respondents acknowledged that this action was solely for injunctive relief. If this case involved other relief, *i.e.,* damages or a declaratory judgment, such a motion would have been most inappropriate.

The prayer for general relief was only pleader's surplusage, and F. R. C. P. 82 prohibits F. R. C. P. 54(c) from being used to confer jurisdiction upon the Court.

In *Oman Const. Co. v. Int'l Bro. of Teamsters, Local 327,* 263 F. Supp. 181, 183 (M. D. Tenn. 1966) the same district court which refused to remand the present case acknowledged that the present case was not distinguishable from one where there was no prayer for general relief.

Rule 82 provides that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts." The authority conferred by 54(c) to grant relief not demanded applies

23. ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

only when jurisdiction has attached and for the purpose of doing substantial justice without the impediment of any technical rules of pleading. However, the plaintiff is master of his claim; while he cannot deprive the district court of jurisdiction in a proper case, neither can the court take jurisdiction because of a claim for relief which the plaintiff might have asserted but did not and does not want. *Merchants Refrig. Co. of Calif. v. Warehouse Union,* 213 F. Supp. 177, 178 (N. D. Cal. 1963). In filing its motion for reconsideration in the district court, Avco made clear that it sought only injunctive relief (A. 23).

Finally, it is well established that removal should not be allowed in cases of doubt. See, *e.g., Shamrock Oil & Gas Corp. v. Sheets,* 313 U. S. 100 (1941); *Glucksman v. Columbia Broadcasting System, Inc.,* 219 F. Supp. 767, 768 (S. D. Cal. 1963). Where want of federal jurisdiction would make futile the litigation in the federal court, every doubt should be resolved in favor of remand. *Rodriguez v. Union Oil Co.,* 121 F. Supp. 824, 828 (S. D. Cal. 1954). No less should be done where removal serves to defeat the fundamental congressional policies reflected in § 301 of the Labor Management Relations Act of 1947.

CONCLUSION.

For the above reasons, this action for injunctive relief against violation of a no-strike clause should have been remanded to the state court. The lack of original jurisdiction in the district court dictates this conclusion. More importantly, remand would compel the union and employees to use the peaceful procedures of the collective bargaining agreement and thereby achieve one of the prime objectives of § 301. Remand will give effect to the basic objective of § 301 to supplement, and not destroy, existing state remedies for the enforcement of collective bargaining agreements. The Norris-LaGuardia Act was never intended to

impose any restraint upon state court injunctive powers and enactment of § 301 did not change this situation.

The judgment should be reversed and remanded with a direction that it be remanded to the state court.

Respectfully submitted,

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OCTOBER TERM, 1967

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AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (A. 38-48) is reported at 376 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1967. (A. 48-49) The petition for certiorari was filed July 31, 1967, and was granted October 9, 1967. This Court has jurisdiction under 28 U.S.C. 1254(1) (1964).

QUESTIONS PRESENTED

(1) Whether a state court suit by an employer seeking an injunction for breach of the "no-strike" clause in a collective bargaining agreement may be removed by the defendants to the United States District Court as a civil action of which the District Court has original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States; and (2) whether, after removal, the state court injunction previously issued enforcing a "no-strike clause" should be dissolved by the United States District Court.

STATUTES INVOLVED

This case involves Sections 1441 and 1447 of the Judicial Code of 1948, 62 Stat. 937-939, as amended, 63 Stat. 102 (1949) and 78 Stat. 266 (1964), 28 U.S.C. 1441, 1447 (1964); Sections 1, 2, 4, 7 and 13 of the Norris-LaGuardia Act of 1932, 47 Stat. 70-71, 73, 29 U.S.C. 101, 102, 104, 107 and 113 (1964); and Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156-157, 29 U.S.C. 185 (1964). The relevant statutory provisions are set forth in Appendix A, *infra*, pages App. A, 1-8.[1]

STATEMENT

The State Chancery Court Suit

On October 15, 1965, Petitioner filed its Bill of Complaint in the Chancery Court for Davidson County, Tennessee, praying for injunctive relief against recurrent strikes in violation of the express "no-strike" commitment in its collective bargaining agreement with Aero Lodge No. 735, International Association of Machinists and Aerospace Workers (herein called "Aero Lodge"), as well as

[1] The separately bound Appendix is referred to herein as "A." The Appendix annexed to this brief is referred to herein as "App. A."

in violation of the explicit prohibition against work stoppages contained in the grievance and arbitration procedures of that agreement. The Bill averred facts showing that the interruptions of work had obstructed or halted vital production for the national defense, including military hardware then actively utilized in Vietnam, and that the legal remedy was inadequate. Named as defendants were Aero Lodge and numerous persons joined individually and as officers or committee members of Aero Lodge, together with other persons joined individually and as representatives of the class engaged in the activities alleged. (A. 2-10)

On the same date, a Chancellor of the Chancery Court for Davidson County directed the issuance of a temporary injunction as prayed for, upon the giving of an appropriate bond in the amount of $10,000.00. (A. 10)

The Proceedings in the U. S. District Court

The defendants named in the Bill thereupon filed a Petition for Removal of the cause to the United States District Court for the Middle District of Tennessee, Nashville Division. (A. 11) Immediately thereafter, they filed in the District Court a motion to dissolve the temporary injunction, and to dismiss the case, advancing the argument that the complaint sought, and Petitioner had been granted, relief which the District Court had no power to issue and maintain under the limitations of the Norris-LaGuardia Act.[2]

Petitioner promptly moved in the District Court to remand the cause to the Chancery Court for Davidson County, urging (1) that the suit was not founded on a claim arising under the laws of the United States, as averred in the removal petition, but instead was founded on a claim of breach of contract arising under state law,

[2] 47 Stat. 70 (1932), 29 U.S.C. 101 (1964). (App. A, page 2)

and (2) that the District Court, by reason of the Norris-LaGuardia Act, had no original jurisdiction satisfying the requisites of the removal sections of the Judicial Code.[3]

The District Court, by its order entered March 2, 1966, denied the Petitioner's motion to remand, granted the motion to dissolve the injunction, and denied the motion to dismiss the action. (A. 17-22) In refusing to remand the cause to the Tennessee Chancery Court, the District Court expressly recognized that the Court of Appeals for the Third Circuit had held squarely to the contrary in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822. (A. 18)

After a motion for reconsideration before the District Court (A. 23-35) was denied by an order entered on March 23, 1966 (A. 36-37), an appeal was taken by Petitioner to the Court of Appeals for the Sixth Circuit. (A. 37)

The Decision of the Court of Appeals

On appeal the Court of Appeals refused to accept the holding of its sister Circuit in *American Dredging*[4] and affirmed the judgment of the District Court. (A. 38-49) Rejecting the concept that Petitioner's suit in the Chancery Court was based exclusively upon a state-created right, the Court of Appeals characterized all actions involving the breach of collective bargaining agreements in industries affecting interstate commerce as preemptively governed by

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[3] The joinder of Tennessee citizens as defendants rendered the case removable under Section 1441(b), only upon establishment of "arising under" jurisdiction founded on the "laws of the United States." 62 Stat. 938 (1948), 28 U.S.C. 1441(b) (1964). (App. A, page 1)

[4] American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Engineers, *supra* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822.

Section 301 of the Labor Management Relations Act.[5] According to the Sixth Circuit's reading of *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 1 L.Ed. 2d 972 and *Local 174, Teamsters* v. *Lucas Flour Co.* (1962) 369 U.S. 95, 7 L.Ed. 2d 593, state law no longer exists "as an independent source of private rights to enforce collective bargaining contracts." (A. 42) Also, federal law does not permit continued injunctive enforcement of collective bargaining agreements by state courts.

Having depicted Petitioner's action as one arising under the laws of the United States and, therefore, removable, the Court of Appeals went on to declare that Section 4 of the Norris-LaGuardia Act[6] did not withdraw jurisdiction of the Petitioner's suit from the federal courts so as to defeat removal. In so doing, the court below expressly rejected the Third Circuit's decision in *American Dredging*. (A. 40)

The Court of Appeals approved the action of the District Court in dissolving the state court injunction previously issued. The Court of Appeals recognized that Norris-LaGuardia "specifically applies only to Federal Courts" (A. 46) but nonetheless announced the view that uniform development of the federal law of labor contracts would be undermined by the existence of the differing injunctive remedies available in the various States. Hence, the court asserted that "the remedies available in State Courts are limited to the remedies available under Federal law." (A. 47) Summarizing the opinion of the Court of Appeals in its own words (A. 48):

> "Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The

[5] 29 U.S.C. 185 (1964). App. A, pages 7-8)
[6] 29 U.S.C. 104 (1964). (App. A, page 3)

Congress has declared that injunctions shall not issue to restrain peaceful picketing."

SUMMARY OF ARGUMENT

This case explores the interplay of the *Norris-LaGuardia Act of 1932*, the *Labor Management Relations Act, 1947*, and the removal sections of the *Judicial Code of 1948*. Its decision should be governed by applicable Constitutional provisions, and by the intent of Congress disclosed in the plain meaning of the language employed in the statutes, and in relevant legislative history.

The importance of the case to meaningful collective bargaining and labor peace cannot be exaggerated. Respect for the no-strike clause, the civilized grievance and arbitration procedures of collective bargaining agreements, and prompt and effective suppression of "wildcat" strikes in violation of contract, are essential if the institution of collective bargaining is to survive and serve the public interest.

Under the Tenth Amendment judicial power is reserved to the States unless withdrawn by specific enactment of Congress. In the exercise of this reserved power, state courts of equity have enjoined strikes in breach of contract where the legal remedy was shown to be inadequate and irreparable injury was threatened.

When Congress enacted the *Norris-LaGuardia Act* in 1932, it intended and stated that its restrictive provisions apply only to federal courts. Accordingly, the Act has not heretofore been regarded as limiting state court jurisdiction to enforce labor contracts by enjoining strikes in breach of express or implied agreements not to strike.

Congress, in enacting the *Labor Management Relations Act, 1947*, had no thought or intention of altering thereby or diminishing in any way the existing remedial jurisdiction of state courts of equity. The "basic purpose of Sec-

tion 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." The intention was "not to encroach" on and "not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." [7] The extension of *Norris-LaGuardia* restrictions to state courts was not intended or even considered. Therefore, this traditional field of state court jurisdiction was not affected nor preempted.

There is not the slightest indication, and no contention, that in enacting the removal sections of the *Judicial Code of 1948*, which merely consolidated previous removal provisions and up-dated and simplified phraseology, Congress intended to extend the coverage of *Norris-LaGuardia* or diminish existing state court jurisdiction.

In reviewing the interplay of the three crucial statutes, and reconciling them, one must conclude, therefore, that the court below erred when it held that (a) Norris-LaGuardia restraints now apply to state courts, (b) an injunction suit filed in a state court to enforce a union agreement not to strike is founded on "a claim or right arising under the Constitution, treaties or laws of the United States" and (c) the instant suit is a "civil action of which the district courts have original jurisdiction," all within the meaning of the removal sections of the *Judicial Code of 1948*, 62 Stat. 938, 28 U.S.C. 1441(b) (1964).

The conflicting decision of the Court of Appeals for the Third Circuit in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; (1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L. Ed. 2d 822 is correctly decided. The decision of the Sixth Circuit should be reversed, with directions to

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[7] Charles Dowd Box Co. v. Courtney (1962) 368 U.S. 502, 508-09, 511, 7 L.Ed. 2d 483, 488-89.

reinstate the injunction erroneously dissolved and remand the cause to the Chancery Court for Davidson County, Tennessee.

ARGUMENT

I

ABSENT FEDERAL STATUTORY PREEMPTION, THE TENNESSEE CHANCERY COURT HAD JURISDICTION TO ENTERTAIN THE CAUSE AND ISSUE THE INJUNCTION OF OCTOBER 15, 1965.

Under the Tenth Amendment to the Constitution of the United States, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." The Chancery Court of Tennessee, in which the instant cause was initially filed, was created by the Legislature in 1858. Tenn. Code Ann. 16-601 (1955). It was empowered to function and still does function as a separate equity court hearing only equity cases and granting only equity remedies.[8]

The Bill of Complaint which initiated this proceeding in the court below was filed by the Petitioner in the Chancery Court for Davidson County, Tennessee. It alleged facts entitling the Petitioner to equitable relief under the traditional usages of equity and prayed only for an injunction and such "general relief" as a court of equity could grant. The prayer for "general relief" was immaterial.[9]

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[8] Besides Tennessee, four other states have separate equity courts:

Arkansas—Ark. Stat. Ann. §§ 27-201-15 (1947)
Delaware—Const., Art. 4, § 10, Del. Code Ann. (1966).
Mississippi—Const., §§ 156, 157, 159, Miss. Code Ann. (1956)
Vermont—Vt. Stat. Ann., Tit. 4, § 211-18 (1959)

[9] The Supreme Court of Tennessee has held that under Tennessee Chancery practice such a prayer is of no significance. If the injunctive prayer is denied, the suit will be dismissed without further proceedings. Mengle Box Co. v. Lauderdale County (1921) 144 Tenn. 266, 230 S.W. 963. The Bill of Complaint in *Mengle* contained a prayer for general relief (A. 35), but notwithstanding

In view of the allegations in the sworn Bill of Complaint, the Chancery Court, under Tennessee law and practice, clearly had the right to issue the fiat of October 15, 1965 (A. 10), directing the Clerk to "issue the injunction prayed for therein." The action of the Tennessee court in enjoining the strike in breach of the "no suspension of work" provision of Article IX of the collective bargaining agreement and of the "no-strike clause" of Article XIII (A. 5-6) to avert irreparable injury was in conformity with the law of most states,[10] existing under the reserve powers protected by the Tenth Amendment to the Constitution of the United States.

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this, a decree dissolving the injunction therein was deemed a final decree, since there was nothing left for future determination. Accord: Caldwell v. Hufstetter (1938) 173 Tenn. 225, 116 S.W.2d 1017.

[10] See, for example: *Alabama*—Alabama Cartage Co. v. Int'l Bhd. of Teamsters (1948) 250 Ala. 372, 34 So. 2d 576; *California*—McCarroll v. Los Angeles County District Council of Carpenters (1957) 49 Cal. 2d 45, 315 P. 2d 322, *cert. denied* (1958) 355 U.S. 932, 2 L. Ed. 2d 415; A. I. Gage Plumbing Supply Co. v. Local 300, Int'l Hod Carriers (1962) 202 Cal. App. 2d 197, 20 Cal. Rptr. 860; *Iowa*—Dugdale Construction Co. v. Local 538, Operative Plasterers (1965) 257 Iowa 997, 135 N.W. 2d 656; *Kentucky*—Armco Steel Corp. v. Perkins (1967) 411 S.W. 2d 937, 64 LRRM 2539; *Minnesota*—McLean Distributing Co. v. Local 993, Brewery and Beverage Drivers (1959) 254 Minn. 204, 94 N.W. 2d 514, *cert. denied* (1959) 360 U.S. 917, 3 L. Ed. 2d 1534; *New York*—Dairymen's League Cooperative Ass'n v. Conrad (1962) 33 Misc. 2d 914, 228 N.Y.S. 2d 420, *aff'd*, 16 App. Div. 2d 869, 229 N.Y.S. 2d 736; Bee Line Inc. v. Long Island Local 252, Transport Workers (1956) 157 N.Y.S. 2d 232; Anchor Motor Freight v. Teamsters Local 445 (1958) 12 Misc. 2d 757, 171 N.Y.S. 2d 506, *aff'd*, 5 App. Div. 2d 869, 171 N.Y.S. 2d 511, *further proceedings*; 10 App. Div. 2d 994, 204 N.Y.S. 2d 98 *and* 11 App. Div. 2d 766, 204 N.Y.S. 2d 891; Republic Aviation Corp. v. Republic Lodge 1987, Int'l Ass'n of Machinists (1957) 10 Misc. 2d 783, 169 N.Y.S. 2d 651; McLean Trucking Co. v. Doyle (1959) 17 Misc. 2d 478, 184 N.Y.S. 2d 114, *aff'd*, 8 App. Div. 2d 789, 188 N.Y.S. 2d 943, *motion for leave to appeal denied*, 9 App. Div. 2d 677, 193 N.Y.S. 2d 223; *Ohio*—General Electric Co. v. UAW (1952) 93 Ohio App. 139, 108 N.E. 2d 211, *appeal dismissed*, 158 Ohio St. 555, 110 N.E. 2d 424; Foley Construction Co. v. Teamsters Local 100 (1960) 85 Ohio L. Abs. 332, 14 Ohio Op. 2d 59, 172 N.E. 2d 170; *Pennsylvania*—Shaw Electric Co. v. Local 98, IBEW (1965) 418 Pa. 1, 208 A. 2d 769; General Bldg. Contractors Ass'n v. Local 542 (1952) 370 Pa. 73, 87 A. 2d

II

THE JURISDICTION OF THE TENNESSEE CHANCERY COURT TO ENTERTAIN THE CAUSE AND ISSUE THE INJUNCTION HAS NOT BEEN PREEMPTED BY FEDERAL LEGISLATION

A. The Power of a State Court to Exercise Jurisdiction Reserved to the State by the Tenth Amendment May Only Be Restricted by the Constitution of the United States or Federal Legislation.

In *Douglas* v. *City of Jeannette* (1943) 319 U.S. 157, 87 L.Ed. 1324, this Court held that:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution." 319 U.S. at 162-63.

B. The Restrictions of the Norris-LaGuardia Act Do Not Apply to the Tennessee Chancery Court.

By its express terms, the provisions of the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. 101 (1964) (App. A., page 2) apply only to a "court of the United States, as defined in this chapter." Section 13 of the Act, in paragraph (d) states that:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia." 47 Stat. 73, 29 U.S.C. 113(d) (1964) (App. A, pages 6-7)

250; Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (1955) 382 Pa. 326, 115 A. 2d 733, *cert. denied*, 350 U.S. 843, 100 L. Ed. 751; *Washington*—Associated Gen'l Contractors v. Trout (1961) 59 Wash. 2d 90, 366 P. 2d 16.

This Court, in *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195, 8 L.Ed. 2d 440 described the Norris-LaGuardia Act as one which "barred *federal* courts from issuing injunctions" in specified cases. 370 U.S. at 196 (emphasis added) The Court of Appeals below, in its opinion, acknowledged that "Section 4 (of Norris-LaGuardia) specifically applies only to *Federal Courts. . . .*" 376 F. 2d 342 (A. 46, emphasis added). Thus, it is undisputed that when enacted, the Norris-LaGuardia Act applied only to federal courts. It cannot apply to the Tennessee Chancery Court unless some subsequently enacted federal statute has extended its limitations to state courts.[11]

C. Section 301 of the Labor Management Relations Act, 1947, Does Not Extend the Limitations of the Norris-LaGuardia Act to State Courts.

The only statute relied on by the courts below as a basis for holding that the restraints of the Norris-LaGuardia Act now apply to the Tennessee Chancery Court is Section 301 of the Labor Management Relations Act, 1947, as amended. 61 Stat. 156-157, 29 U.S.C. 185 (1964). (App. A, pages 7-8) The court below construed Section 301 as containing "a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law." 376 F. 2d 342 (A. 46)

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[11] "[Norris-LaGuardia] explicitly applies only to the authority of *United States courts* 'to issue any restraining order or injunction.' All other remedies in federal courts and *all remedies in state courts remain available.*" Frankfurter and Greene, *The Labor Injunction* (1930) at page 220. (emphasis added) Accord: International Longshoremen's Union v. Wirtz (CA 9; 1948) 170 F. 2d 183, 185-186, *cert. denied* (1949) 336 U.S. 919, 93 L. Ed. 1082, *rehearing denied*, 336 U.S. 971, 93 L. Ed. 1121; McCarroll v. Los Angeles County District Council (1957) 49 Cal. 2d 45, 315 P. 2d 322, 332-33, *cert. denied* (1958) 355 U.S. 932, 2 L. Ed. 415; Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (1955) 382 Pa. 326, 115 A. 2d 733, *cert. denied* (1955) 350 U.S. 843, 100 L. Ed. 751; Shaw Electric Co. v. Local 98, IBEW (1965) 418 Pa. 1, 208 A. 2d 769, 775, n. 17.

Citing decisions of this Court subsequent to the landmark decision in *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, the court below reasoned that:

> "If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity of application, the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d 343 (A. 47).

It is submitted that the above conclusions of the Court of Appeals are erroneous. By its terms, Section 301 makes no reference whatsoever to state courts. It makes no reference to the Norris-LaGuardia Act. It makes no reference to injunctions or injunctive relief. By its terms, all that the crucial paragraph (a) of Section 301 does is confer on the federal courts a jurisdiction over suits for violation of collective bargaining contracts which did not previously exist. Paragraph (a) merely states:

> "*Suits for violation of contracts between an employer and a labor organization* representing employees in an industry, affecting commerce as defined in this Act, or between any such labor organizations, *may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.*" (App. A, page 7; emphasis added).

In *Textile Workers Union* v. *Lincoln Mills, supra* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, the Court, in construing Section 301(a), concluded:

> ". . . that the *substantive* law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456 (emphasis added).

Any possible thought that this reasoning meant that state court jurisdiction over suits to enforce labor contracts had been preempted by Section 301 and that the state courts no longer had jurisdiction to enforce labor contracts after the enactment of Section 301 was dissipated by the Court's subsequent decision in *Charles Dowd Box Co.* v. *Courtney* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, in which it was held that "in enacting § 301(a)" Congress did not intend "to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal." 368 U.S. at 507.

It seems evident that the "federal law" to be fashioned from the policy of national laws under Section 301(a) is limited to "substantive" areas and does not cover the entire field of law brought into play by a suit to enforce a collective bargaining agreement. In *Lincoln Mills, supra* (1957) 353 U.S. 448, 457, 1 L. Ed. 2d 972, this Court expressly limited its ruling on uniformity to "substantive law." In *Smith* v. *Evening News Ass'n* (1962) 371 U.S. 195, 200, 9 L. Ed. 2d 246, the Court referred to "a uniform body of federal *substantive* law." (emphasis added) In *Local 174, Teamsters* v. *Lucas Flour Co.* (1962) 369 U.S. 95, 7 L. Ed. 2d 593, the Court stated that:

> "The dimensions of § 301 requires the conclusion that *substantive* principles of federal labor law must be paramount in the area covered by the statute." 369 U.S. at 103 (emphasis added).

It reasoned that:

> "Once the collective bargain was made, the possibility of conflicting *substantive* interpretation under com-

peting legal systems would tend to stimulate and prolong disputes as to its interpretation." 369 U.S. at 103-104 (emphasis added).

The Court said:

"The importance of the area which would be affected by separate systems of *substantive* law makes the need for a single body of federal law particularly compelling." 369 U.S. at 104 (emphasis added).

Likewise, in *UAW* v. *Hoosier Cardinal Corp.* (1966) 383 U.S. 696, 16 L. Ed. 2d 192, the Court stated that:

"Once the collective bargain was made, the possibility of conflicting *substantive interpretation* under competing legal systems would tend to stimulate and prolong disputes as to its interpretation." 383 U.S. at 702 (emphasis added).

In footnote 4, the Court for the first time suggested what it had meant in these decisions by the significant limiting adjective "substantive." The Court stated:

"Our cases have spoken of the federal law applicable to § 301 suits as 'substantive,' see, e.g., Textile Workers v. Lincoln Mills, 353 U.S. at 456, 1 L. Ed. 2d at 980, and the need for uniformity in the 'substantive principles' that govern these suits. [Citing *Lucas Flour* at 599] In the view we take of the problem presented here, we need not decide whether statutes of limitations are 'substantive' or 'procedural.' [Citing cases] Nor need we rigidly classify them as 'primary' or 'remedial.' To the extent that these terms are useful, we need only notice that lack of uniformity in limitations provisions is unlikely to have substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights in the collective bargaining process. See Wellington, Labor and the Federal System, 26 U. Chi. L. Rev. 542, 556-559."

In rejecting the contention that State statutes of limitations should not apply to Section 301 suits, this Court noted that "the teaching of our cases does not require so bald a form of judicial innovation." 383 U.S. at 701. The fashioning of uniform federal law should be strictly limited to areas required for the achievement of the objectives of Congress when it enacted the law twenty years ago. The Court stated that:

> "The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal law is chiefly designed to promote—*the formation of the collective agreement* and the *private settlement of disputes under it.*" 383 U.S. at 702 (emphasis added).

In *Local 174, Teamsters* v. *Lucas Flour Co., supra* (1962) 369 U.S. 95, 103, 7 L. Ed. 2d 593, the Court noted the desirability of uniform construction of contract terms as a typical area requiring uniformity. The Court, in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L. Ed. 2d 192, quoted *Lucas Flour* as stating that:

> "The possibility that individual contract terms might have different meanings under [two systems of law] would inevitably exert a disruptive influence upon both the *negotiation* and *administration of* collective agreements." 383 U.S. at 701-02 (emphasis added).

In applying the tests of Congressional intent and achievement of Congressional objectives, the Court reasoned that if contract provisions had different meanings under two or more systems of law, it would impede the process of *negotiating* an agreement and would also "*tend to stimulate and prolong disputes* as to its interpretation." 383 U.S. at 702 (emphasis added).

If the tests of Congressional intent and achievement of Congressional objectives are applied to the problem posed in the instant case, it seems clear that the decision of the court below is erroneous. When it enacted Section 301 in 1947, Congress never intended such a result. Indeed, this decision frustrates the achievement of basic Congressional objectives.

A basic objective of Congress in enacting Section 301 was to reduce the number and duration of strikes by enhancing and expanding the enforcement of collective bargaining agreements into which employers are compelled to enter under the system of law set forth in the National Labor Relations Act, as construed and applied by the National Labor Relations Board. Senate Report No. 105, 80th Cong., 1st Sess., quoted in *Lincoln Mills, supra* (1957) 353 U.S. 448, 454, 1 L. Ed. 2d, 972, emphasized that:

> "Without some *effective* method of *assuring* freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." Senate Report at 16 (emphasis added).

and further stated that:

> "Statutory recognition of the collective agreement as a valid, binding and *enforceable* contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." Senate Report at 17-18 (emphasis added).[12]

After reviewing the legislative history, this Court stated, in *Dowd Box, supra* (1962) 368 U.S. 502, 7 L.Ed. 2d 483:

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[12] The legislative history of Section 301 is fully summarized in an appendix to the Court's decision in Textile Workers Union v. Lincoln Mills, *supra* (1957) 353 U.S. 448, 485-546, 1 L. Ed. 2d 972, 997-1027.

> "The legislative history makes clear that *the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums* for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that *Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.*" 368 U.S. at 508-09 (emphasis added).

The Court further said that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts *was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts* made by labor organizations." 383 U.S. at 511 (emphasis added).

and also stated:

> ". . . the entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law of some of the States, *not to abolish existing state court jurisdiction.*" 383 U.S. at 512 (emphasis added).

The Court quoted Senator Ferguson as stating, with respect to Section 301, "*It takes away no jurisdiction of the State courts.*" 383 U.S. at 512 (emphasis added). The Court observed that:

> "Section 301(a) reflects congressional recognition of the *vital importance of assuring the enforceability of such agreements.*" 383 U.S. at 509 (emphasis added).[13]

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[13] In Dowd Box, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court noted that:

> "The direct antecedent of § 301 was § 10 of the Case bill, H.R. 4908, 79th Cong., 2d Sess., which was passed by both Houses

Similarly, in *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, the Court quoted the House Conferees as having "agreed that suits for breach of such agreements should remain wholly private and '*be left to the usual processes of the law*'." 370 U.S. at 207 (emphasis added).

This Court has recently stressed that:

> ". . . labor legislation is peculiarly the product of legislative compromise of strongly held views, . . . and that legislative history may not be disregarded merely because it is arguable that a provision may unambigu-

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of the Congress, but vetoed by the President in 1946." and that:

". . . the Case bill contained provisions substantially the same for present purposes as the provisions of § 301 at issue in this case." 368 U.S. at 509 (Footnote omitted).

It then observed that:

"A spokesman for the (Case) bill, Senator Ferguson, stated unequivocally that state court jurisdiction would not be ousted by enactment of the federal law:

'Mr. Ferguson. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts, and the mere fact that the Senator and I disagree does not change the effect of the amendment.

'Mr. Murray. But it authorizes the employers to bring suit in the Federal courts, if they so desire.

'Mr. Ferguson. That is correct. That is all it does. *It takes away no jurisdiction of the State courts.*' 92 Cong. Rec. 5708." 368 U.S. at 512 (emphasis added).

In Dowd Box, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court also quoted Senator Ball, "one of the Floor leaders for the bill" as stating:

"'[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. *It does not go beyond that.* As a matter of law, I think they have that right, now, but because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult; . . .' 93 Cong. Rec. 5014." 368 U.S. at 512 (emphasis added; footnote omitted).

ously embrace conduct called in question." *NLRB* v. *Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 179, 18 L. Ed. 2d 1123.

Accord: *National Woodwork Mfrs. Ass'n* v. *NLRB* (1967) 386 U.S. 612, 619-20, 18 L. Ed. 2d 357.

The decision of the court below clearly encroaches upon the existing jurisdiction of a state court. It displaces "thoroughly considered jurisdiction of the various courts of the United States over contracts made by labor organizations." It abolishes an "existing state court jurisdiction."

Applying the tests enunciated in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 701-03, 16 L. Ed. 2d 192, it seems evident that elimination of the present existing state court injunction remedy is not necessary in order to achieve any significant goal of labor policy which Congress had in mind in 1947. Congress did not believe that the existence of an effective remedy for violation of a labor contract would impede the formation of collective agreements. In their minority report annexed to Senate Report No. 1177, 79th Cong., 2nd Sess., in support of the wording of Section 301(a), which was ultimately accepted by the Congress, Senators Ball, Taft and H. Alexander Smith stated, at pages 13-14:

> "It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> "This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.
>
> "In any event, it is certainly a point to be bargained over and any union with the status of 'representative'

> under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." [14]

Also, it is evident that the continued existence of the injunctive remedy in the many States where the remedy is available cannot in any legitimate way impede "the private settlement of disputes." If it has promised not to strike for the term of the agreement, as in the instant case, a union has no right to employ the strike remedy to pressure the settlement of a dispute arising during the term of the agreement. The 1947 Senate Report, *supra*, stated, at page 16:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations." [15]

This Court recognized the union's obligation not to strike in violation of agreement, stating, in *Lincoln Mills*, *supra* (1957) 353 U.S. 448, 455, 1 L. Ed. 2d 972:

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." [16]

Assuming, as we must, that the private settlement of disputes and the Congressional objective of labor peace will be enhanced by requiring unions to keep their promises not to strike, it is apparent that Congressional policy is best

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[14] Reproduced in legislative history annexed to Lincoln Mills decision (1957) 353 U.S. 448, 501-02, 1 L. Ed. 2d 972, 1005.

[15] Quoted in Lincoln Mills, *supra*, 353 U.S. at 454, 1 L. Ed. 2d at 979.

[16] Paraphrasing one commentator, Lincoln Mills dealt with the "quid"—Avco is the "quo." Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause* (1962) 48 ABAJ 914, 920-21.

accomplished by *more* enforcement—not *less* enforcement—of the no-strike clause than that which existed when Section 301(a) was enacted. Surely, in view of the assurances quoted above given by Senators Taft, Ferguson, Ball and others, it would outrage Congressional policy to construe this Act, which was clearly intended to give *additional* remedies not then available, as taking away a then existing remedy which was effective in the enforcement of no-strike agreements.

The Court looked to Congressional intent in its recent decision in *Vaca* v. *Sipes* (1967) 386 U.S. 171, 17 L. Ed. 2d 842. After exceptions to the Federal pre-emption rule were reviewed, the Court stated:

> "While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." 386 U.S. at 180.

The Court, in holding that the duty of fair representation had not been pre-empted by the LMRA, and could still be enforced by a state court, observed that:

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. . . . The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb

> arbitrary conduct by the individual employee's statutory representative." 386 U.S. at 182-83.

If, in the instant case, the Court likewise looks to the intention of Congress in 1947 in construing the true dimensions of Section 301, it must likewise conclude that Congress had no intention of ousting state courts, such as the Chancery Court of Tennessee, of their traditional jurisdiction to enforce collective bargaining agreements by injunctive process. Indeed, to paraphrase Mr. Justice Frankfurter, "No one would have been more startled by such a conclusion than [Senator Taft]." [17]

There is no basis at all for the view of the court below that Congress, in enacting Section 301 in 1947, in some way intended to apply the restrictions of the Norris-LaGuardia Act to state courts and to pre-empt this limited remedial area of state court jurisdiction and make it a part of federal law. There is not a word in the 1947 legislative history to support such a farfetched inference.

In *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, this Court reviewed the possible impact of Section 301 on Norris-LaGuardia. It had been contended that Section 301 impliedly modified or partially repealed Norris-LaGuardia. The Court rejected this construction, observing that:

> ". . . the failure of Congress to include a provision in § 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed derisable.

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[17] Mr. Justice Frankfurter's reference was to "Mr. LaGuardia." United States v. United Mine Workers (1947) 330 U.S. 258, 316, 91 L. Ed. 884, 925.

> "When the inquiry is carried beyond the language of § 301 into its legislative history, whatever small doubts as to the congressional purpose could have survived consideration of the bare language of the section should be wholly dissipated." 370 U.S. at 205.

When similar reasoning is applied to the instant problem, the error in the decision of the court below is apparent. It must be regarded as significant that Congress, which in 1947 was completely familiar with the restrictive provisions of the Norris-LaGuardia Act and their limited application at that time to federal courts, did not include an express provision in Section 301 extending the Norris-LaGuardia restraints to state courts and state court labor injunctions.

Also, as indicated above, when the inquiry is carried into the legislative history of Section 301, any doubts about Congressional intention should be wholly dissipated. In *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, the Court stressed that the Congressional Conferees "agreed that suits for breach of such [labor] agreements should remain wholly private and 'be left to the usual processes of the law.' . . .", citing Conference Report No. 510, reported in 1 Leg. Hist. 545-46. 370 U.S. at 207. The Court also stated that it could not:

> ". . . accept the startling argument made here that even though Congress did not itself want to repeal the Norris-LaGuardia Act, it was willing to confer a power upon the courts to 'accommodate' that Act out of existence whenever they might find it expedient to do so in furtherance of some policy they had fashioned under § 301." 370 U.S. at 209.

The Court said:

> "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters. Our task

> is the more limited one of interpreting the law as it now stands. In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent" 370 U.S. at 214-15.

The House Committee which participated in the drafting of the 1947 legislation expressed its view that:

> "When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens." [18]

Congress knew in 1947 that state courts, in the exercise of their traditional equity jurisdiction, were enjoining strikes in breach of collective bargaining agreements and that the Norris-LaGuardia Act itself did not apply to them. In Senate Report No. 105, 79th Cong., 2nd Sess., it was stated, for example, that:

> "A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a 'labor dispute' and cannot be enjoined (*The Nevins* v. *Kasmach*, 279 NY 323; *Bulkin* v. *Sacks*, 31 Pa.D & C 501)." [19]

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[18] House Report No. 245 on H.R. 3020; 80th Cong. 1947, 1 Leg. Hist. at 337. Although the House members failed in their effort to make Norris-LaGuardia inapplicable to suits for strike injunctions in the federal courts, their statement strongly implies an intention not to preempt state court no-strike injunctions.

[19] Quoted in Legislative History annexed to Lincoln Mills decision, 353 U.S. at 500, 1 L. Ed. 2d at 1004.

Also illustrative are colloquies during the course of Senate debate on May 9, 1947. In discussing a proposed amendment which would have authorized federal court injunction against strike activities affecting perishable goods, the following colloquies occurred:

> "Mr. Pepper. I am not sure but that the local citizen the Senator from Nebraska describes would have the right of injunctive relief in a local court. We are simply giving the right in the Federal court, but he still has local machinery of which he may avail himself to prevent irreparable damage, if he can make a showing. It seems to me this would bring the matter into Federal jurisdiction.
>
> "Mr. Wherry. I agree that there are remedies in every State, but we are passing a Federal law, to give injunctive relief.
>
> "Mr. Pepper. The Senator would probably find the circuit judge closer than the Federal judge in most States, and I suggest a man would have a complete and adequate remedy in the local courts." 2 Leg. Hist. at 1379-80.

Subsequently, on the same subject, there occurred the following colloquy:

> "Mr. Pepper. There is no doubt of the injunctive power to restrain the commission of an unlawful act. One who might show damage from the unlawful act it seems to me might well be heard and might well have a case in the local courts.
>
> "Mr. Taft. Mr. President, will the Senator yield?
>
> "Mr. Pepper. I yield.
>
> "Mr. Taft. I want to point out that there is no law against courts issuing injunctions. We are using a rather general term here. Of course, a court may always issue an injunction in connection with a lawsuit except as limited by the Norris-LaGuardia Act." 2 Leg. Hist. at 1381.

Apart from legislative history, policy considerations demand the conclusion that Section 301 does not pre-empt the injunctive jurisdiction of state courts and confer an abortive equity jurisdiction on courts of the United States. As indicated above, the dominant objective of Congress was to plug loopholes in the enforcement of collective bargaining agreements. Unions could be sued in federal courts as entities without reference to diversity of citizenship or jurisdictional amount and without taking away "jurisdiction of the state courts." In 1947, Congress was concerned with a statute enacted in 1935 which had radically changed the then existing law of master and servant. The Wagner Act *compelled* employers in interstate commerce to recognize and bargain with labor unions as exclusive bargaining representatives for employees, even though such unions may have been designated by a bare majority of the employees in the appropriate bargaining unit.[20] The employer was required to "bargain in good faith" with such labor organizations as representative for all in the unit. The objective and end product of this compulsion was to be a written and signed collective bargaining agreement setting forth the wages, hours, working conditions and other terms of employment in the bargaining unit for a reasonable period of time. In *Lincoln Mills, supra* (1957) 353 U.S. 448, 453, 1 L.Ed. 2d 972, this Court observed that in enacting Section 301 Congress was "interested in promoting collective bargaining that ended with agreements not to strike" and in 353 U.S. at page 454 quoted the Senate Report (page 16), as stating:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement

[20] "When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties.

> does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract."

To the same effect, a well-known commentator has observed that:

> ". . . About all an employer can get in exchange for his commitments in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed . . ." [21]

Persons with experience in this field are well aware that an injunction, such as that issued by the Chancery Court of Tennessee in the instant case, is the only "effective" method of assuring freedom from economic warfare for the term of the agreement. It has been aptly said that:

> "The discharge of strike leaders does not end the strike; at best, it stops future efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. *Equitable relief is not only*

This is not true of the labor agreement." United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 580, 4 L. Ed. 2d 1409, 1416.

[21] Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 Wash. U. L. Q. 3, 12.

> *the most appropriate remedy, but also the only effective one.*" (emphasis added).[22]

It has also been pointed out that the damage remedy is peculiarly ineffective in a strike situation, because the discipline which makes the strike possible enables the union leaders to insist on dismissal of the damage suit as a condition to ending the strike. In many cases, therefore, the damage remedy is merely a mirage.[23] In the words of one commentator, damages are "patently a miserable substitute for performance."[24] The recognition in *International Ass'n of Machinists* v. *Street* (1961) 367 U.S. 740, 773, 6 L. Ed. 2d 1141, that sometimes: "[*an injunction*] *alone can effectively guard the plaintiff's right*" shows that this Court is well aware of the realities of industrial life considered above. (emphasis added).

Thus, if the objective of labor peace sought by Congress is to be achieved, traditional injunctive remedies available in the courts of most States at the time of the enactment of Section 301 must be preserved and encouraged—not withdrawn and destroyed by attributing a construction to Section 301 which clearly would have been inconceivable to the Senators and Representatives who enacted Section 301 in the climate of 1947.

In attempting to minimize the unfortunate impact of its decision on labor peace, the court below stated, in footnote 3 (A. 46) that:

> "An employer may obtain an order directing a Union to comply with its agreement to arbitrate. A strike in the face of such an order could result in contempt proceedings. This alternative remedy is referred to in

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[22] Stewart, *No-Strike Clauses in the Federal Courts*, 59 Mich. L. Rev. 673, 675 (1961).

[23] Swigert, *"Where Labor Unions Get Their Power,"* U.S. News & World Report, January 21, 1963, at 96, 97.

[24] Rice, *A Paradox of Our National Labor Law*, 34 Marquette L. Rev. 233, 253 (1951). See also, Rice *supra*, at 235, note 15.

Sinclair Refining Co. v. *Atkinson*, *supra*, page 214 and page 227, n. 23."

It is true that in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, the Court said adherence by federal courts to Norris-LaGuardia restraints,

> ". . . does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement." 370 U.S. at 214.

There is no statement that a strike while the arbitration process was taking place would be punished by the federal courts as contempt of the order to arbitrate. The dissenting Justices commented in footnote 23 that:

> "Consistently with what we said in *Lucas*, *supra*, note 2, a strike in the face of such an order would *risk* a charge of contempt." 370 U.S. at 227 (emphasis added).

In *Lucas Flour* (1962) 369 U.S. 95, 7 L. Ed. 2d 593, referred to by the dissenting Justices, the Court merely held that:

> ". . . a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of *the agreement*." 369 U.S. at 105 (emphasis added).

It does not necessarily follow that such a strike would be punishable as contempt of court. On the contrary, in *Lucas Flour*, the remedy there approved by the Court was the award of money damages to an employer. Breach of "agreement" is not contempt.

In *Sinclair*, *supra*, the agreement provided "for compulsory, final and binding arbitration. . . ." 370 U.S. at 197. This Court held that because of the provisions of

Norris-LaGuardia, the United States District Court could not by injunction stop the strike which violated the arbitration agreement. It would circumvent the restrictions of Norris-LaGuardia, as so construed, to hold that the District Court could have done by indirection what it could not have done directly—that it could have ordered the union to arbitrate, and then could have punished it for continuing the strike—even though it could not have ordered an end to the strike itself.[25] Moreover, it is difficult to see how a court could convict a union which literally obeyed the order to arbitrate simply because it asked its members to cease work while the arbitration proceeding was taking place. The only way such a result could be achieved would be to imply an order not to strike from the order to arbitrate. If, as this Court has held in *Sinclair*, *supra*, Section 4 of Norris-LaGuardia "deprives the courts of the United States of jurisdiction to enter" an injunction to prohibit the refusal to perform work (370 U.S. at 203), it would seem to follow that no such injunction could be implied. This being true, it would seem very doubtful that a union which strikes while arbitration proceedings are in process could be held in contempt of the order to arbitrate.[26]

The suggestion of the court below that the problem of stopping a strike in breach of contract can be solved by ordering compliance with the agreement to arbitrate and

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[25] See concurring and dissenting opinion of Mr. Justice Douglas in Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (November 6, 1967), 36 U.S. L.W. 4001, 4005, *rev'g* (CA 3; 1966) 365 F. 2d. 295 and 368 F. 2d 932.

[26] This Court did not reach the question in Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n, *supra*. In that case an arbitrator had already ruled. The District Court purported to enforce the arbitrator's ruling, and found the union in contempt for not accepting the ruling, and going on strike. In reversing, this Court held that the mandatory injunction issued by the District Court had not been sufficiently specific to meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure. Accordingly, the Norris-LaGuardia question was not decided by this Court.

punishing violation by contempt is defective in another respect. There is no provision in applicable federal law for compulsory arbitration. Section 8(d) of the Labor Management Relations Act, 1947, 61 Stat. 142-143, 29 U.S.C. 158(d) (1964) specifies, in defining the duty to bargain, that "such obligation does not compel either party to agree to a proposal or require the making of a concession." Thus, it is quite lawful for an employer and a union to sign a collective bargaining agreement which forbids strikes for the duration of the contract and contains *no* provision for arbitration, leaving the parties to their usual legal remedies for breach of the contract. See *NLRB* v. *American National Insurance Co.* (1952) 343 U.S. 395, 96 L.Ed. 1027. When the no-strike clause in such a contract is violated, the employer should have just as much right to injunctive relief as an employer who has agreed to arbitration. However, the procedure suggested by the court below can give no relief in this situation, even though the employer's contract is lawful and binding, irreparable injury is threatened, and the legal remedy is inadequate.

Today, therefore, as a practical matter, only a state court, exercising traditional equity jurisdiction, can effectively *stop* a strike in breach of contract. If the ruling of the court below is sustained, the end product of the cumbersome and costly compulsory collective bargaining system erected by Congress in 1935, and reaffirmed and reenforced in 1947, will be contracts which contain a cornucopia of benefits for unions and the employees they represent, and a meaningless, practically unenforceable no-strike pledge for employers. Such a reality would expose employers to the possibility of costly disruptive pressures throughout the contract term. The resulting strikes would tend to inflate the cost of goods and services and interrupt their supply. The ultimate consumer would pay the bill. Making contract violation by unions easier than it was in

1947 cannot possibly foster the general welfare, or be in accord with Congressional intent or public policy.

In *Sinclair, supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, the Court held that its hands were tied by statutory language and legislative history. In the instant case, these inhibiting restraints are absent.

Permitting the States to give a more effective remedy than that presently available in the federal courts does not impair the *Lincoln Mills* concept of substantive uniformity. The state courts can still be required to apply federally fashioned law in *interpreting* contracts. But, as in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L.Ed. 2d 192, matters which relate principally to remedy are "unlikely to frustrate in any important way the achievement of any significant goal of labor policy" [27] and should be left to the traditional practices of equity in the several States.

The Court of Appeals expressed concern that if removal is denied "effectiveness of the injunctive remedy would vary from State to State." (A. 47). But under *Hoosier-Cardinal, supra*, the applicable statute of limitations varies from state to state. Also, under *Erie R.R.* v. *Tompkins* (1938) 304 U.S. 64, 82 L. Ed. 1188, the substantive law applied in Federal Courts in diversity cases varies from state to state. This is no reason for depriving a state court of jurisdiction protected by the Tenth Amendment.

Summarizing, in *Dowd Box* and *Lucas Flour*, uniformity was necessary in order to accomplish the objective of Congress. Here, a slavish and sterile application of the concept of uniformity would frustrate and defeat the expressed objective of Congress. Therefore, the reason for uniformity does not exist here as it did in the earlier cases and "uniformity" should not be applied to deprive the state court of its jurisdiction.

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[27] Hoosier Cardinal, *supra*, (1966) 383 U.S. at 702, 16 L. Ed. 2d at 197.

III

THE SUIT WAS NOT REMOVABLE BECAUSE THE DISTRICT COURT DID NOT HAVE ORIGINAL JURISDICTION FOUNDED ON A CLAIM OR RIGHT ARISING UNDER THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES.

Under the language of Section 1441(b) of the Judicial Code of 1948, 62 Stat. 938, 28 U.S.C. 1441(b) (1964), the instant cause is removable only if it is held to be a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ." For reasons detailed in Section II C. above, and for additional reasons set forth below, it is submitted that the suit was not removable and should have been remanded to the state court.

A. Removability Should Be Decided in the Light of Congressional Policy, With Doubts Being Resolved Against Removal.

It is elementary that doubts must be resolved against removal, and that the burden is on the party attempting removal to justify the grounds for it. In *Shamrock Oil & Gas Corp.* v. *Sheets* (1941) 313 U.S. 100, 85 L.Ed. 1214, this Court stated that the removal statute evidenced "the Congressional purpose to restrict the jurisdiction of the federal courts on removal" and that:

> ". . . the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate fed-

eral courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' [Citing cases]" 313 U.S. at 108-09.

As pointed out by Judge Kalodner in *American Dredging Co., supra* (CA 3; 1964) 338 F. 2d 837, at pages 842-43, it is well settled that federal statutes should be construed and applied so as to avoid injustice or absurd consequences. "The reason of the law, in such cases, should prevail over its letter." [28]

Also,

"All laws are to be given a sensible construction, and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. . . . In ascertaining that purpose, we may examine the title of the act [Citing cases] . . . and the legislative scheme or plan by which the general purpose of the act is to be carried out." [29]

The impact of Section 301, and its relationship to Norris-LaGuardia and the removal sections of the Judicial Code of 1948, must be determined in the light of these constructional principles, and with regard to dominant Congressional policy, which was to make collective bargaining agreements *more* enforceable through preserving the established jurisdiction of the state courts (including jurisdiction to issue injunctions) and adding an additional federal court damage remedy.

The significance of such policy factors in arriving at a correct decision in the instant situation has been recognized

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[28] United States v. Kirby (1869) 7 Wall. 482, 487, 74 U.S. 482, 486-87, 19 L. Ed. 278, 280.

[29] United States v. Katz (1926) 271 U.S. 354, 357, 70 L. Ed. 986, 988-89.

by commentators. One writer who has given the problem thorough analysis states that:

> ". . . the solution to this problem should depend upon competing policy considerations rather than a sifting of purely legal considerations. Any decision in this area should be rendered only after the policy of section 301—to make available more effective means of enforcing collective bargaining agreements—is carefully considered. The allowance of state court injunctions and the denial of removal would be one means of furthering that policy." [30]

In the words of another commentator:

> "[I]f state courts do still have the power to enjoin such strikes [in breach of contract], permitting removal would put the removal statutes to a use for which they were never intended. Although the legislative history of the Judicial Code provides no substantial insight into the congressional purpose in allowing removal of suits involving federal questions, removal was certainly not intended to foreclose entirely remedies legitimately available in state courts." [31]

B. The Petitioner's State Court Suit Did Not Arise "under the Constitution, treaties or laws of the United States."

In Section II C. above, it was established that in enacting Section 301, Congress had no intention of depriving state courts of existing enforcement remedies, including their traditional remedy of injunction for breach of contract

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[30] Moskowitz, *Enforcement of No-Strike Clauses by Injunction*, 46 Boston U. L. Rev. 343, 359 (1966).

[31] 113 U. Pa. L. Rev. 1096, 1098 (1965). *Professor Moore* is in accord: "The majority view, which we believe is sound, is that the federal district court must remand suits requesting injunctive relief that is beyond the federal court's original jurisdiction, even when the action couples a prayer for damages, and even when the federal court believes that the state court lacks jurisdiction." *Moore, Federal Practice*, 2d. Ed., Vol. 1A, Sec. 0.167[7], pages 1004-05. See also, *Moore supra*, at 1009.

where irreparable injury otherwise would result. The "basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." Congress "expressly intended not to encroach upon the existing jurisdiction of the state courts." The Congressional purpose "was not to displace, but to supplement, the thoroughly considered jurisdiction of the various States over contracts made by labor organizations." The purpose "was to fill the gaps in the jurisdictional law of some of the States, not to abolish existing state court jurisdiction." The Act "takes away no jurisdiction of the State courts." Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.' " [32]

The statutes in question should be construed so as to effectuate this intention and objective of Congress and not to frustrate it. This Court has held in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, that Congress did not intend to confer on the federal courts jurisdiction to enjoin a strike in breach of contract. Therefore, a suit filed in a state equity court seeking injunctive relief should be held to arise under the laws of that State and not under the laws of the United States. This should be true even though construction of the contract is regarded as a matter of federal law. As Judge Kalodner pointed out in *American Dredging Co.*, *supra* (CA 3; 1964) 338 F. 2d 837, a case does not arise "under the Constitution or a law of the United States merely because it is founded on a right conferred by the Constitution or a federal law." [33]

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[32] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. at 508-09 and 511-13, 7 L. Ed. 2d at 488-90.

[33] American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Engineers (CA 3; 1964) 338 F. 2d at 844.

In *Gully* v. *First National Bank in Meridian* (1936) 299 U.S. 109, 115, 81 L.Ed. 70, this Court observed that:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."

To the same effect this Court stated, in *Shulthis* v. *McDougal* (1912) 225 U.S. 561, 569, 56 L.Ed. 1205, that:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

Likewise, in *Pan American Petroleum Corp.* v. *Superior Court* (1961) 366 U.S. 656, 662, 6 L.Ed. 2d 584, this Court stated that questions "of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law."

It is submitted that in its implementation of the doctrine of *Lincoln Mills, supra* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, this Court should limit its fashioning of uniform, paramount, federal law to areas where uniformity is important to the achievement of Congressional objectives. Until state law conflicts in an area important to the Congressional objective, and has been absorbed by federal law, it continues to exist, and may co-exist with federal law. As Section 301(a) was never intended to apply to suits for injunction against strikes, the state injunction remedy can so co-exist. In *Kelly* v. *State of Washington* (1937) 302 U.S. 1, 82 L.Ed. 3, it has been observed that:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appro-

priate to their territorial jurisdiction although interstate commerce may be affected. [Citing cases] States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced." 302 U.S. at 9-10.[34]

C. The District Court Did Not Have "Jurisdiction" of the Cause

The Dictionary defines "jurisdiction" as, "[t]he authority by which judicial officers take cognizance of and decide causes . . . the power to hear and determine a cause . . ." [35]

"Jurisdiction", as used in 28 U.S.C. 1441(b) (1964), means jurisdiction of the cause. In *Reynolds* v. *Stockton* (1891) 140 U.S. 254, 268, 35 L.Ed. 464, the Court stated that:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case."

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[34] Accord: California v. Zook (1949) 336 U.S. 725, 93 L. Ed. 1005 and cases discussed therein. For a relevant application of the principle, see El Mundo v. Puerto Rico Labor Relations Board (1965) ... P.R. ..., 53 CCH Lab. Cas., Sec. 51,472, *cert. denied* (1966) 384 U.S. 939, 16 L. Ed. 2d 538, in which the Puerto Rico Supreme Court rejected a contention that Section 301 had preempted the labor contract enforcement field, and stated, "The fact that the Federal legislation authorizes an action for damages for such violation—Section 301, Taft-Hartley Act—and that such actions for damages are within the jurisdiction of the courts, either federal or state, does not prevent our Labor Relations Board, as an administrative agency, from taking cognizance under our Act of such violations as an unfair practice. This question has been clearly decided by this Court." 53 CCH Lab. Cas., Sec. 51,472 at page 65,243.

[35] *Bouvier's Law Dictionary*, Rawle's Third Revision, page 1760.

The court below stated that:

> "The Norris-LaGuardia Act does not deny to Federal Courts jurisdiction over the parties or the subject matter.
>
> * * * * *
>
> "The loss of the power to grant certain equitable remedies does not mean Federal Courts have lost jurisdiction over the subject matter or parties." (A. 43)

In so holding, the court seems to have ignored the repeated use by Congress of the precise word "jurisdiction" in the Act,[36] and the repeated statement that no federal court "shall have jurisdiction to issue" an injunction in a labor dispute. Also, the court seems to have overlooked a significant holding by this Court in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, relied on heavily by the Third Circuit in its decision in *American Dredging Co.*, *supra* (CA 3; 1964) 338 F. 2d 837. Count 3 of the complaint filed by the employer in the District Court in *Sinclair* prayed for injunctive relief against breach of the no-strike clause. This Court, finding that the suit in the District Court filed under Section 301 was subject to the

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[36] In its Title, the Norris-LaGuardia Act declared that it was "An Act to amend the Judicial Code and to define and *limit the jurisdiction* of courts sitting in equity, and for other purposes." Section 2—"Declaration of the public policy of the United States" stated, in relevant part: "In the interpretation of this Act and in determining the *jurisdiction* and authority of the courts of the United States, as such *jurisdiction* and authority are herein defined and limited, the public policy of the United States is hereby declared as follows: . . . therefore, the following definitions of, and limitations upon, the *jurisdiction* and authority of the courts of the United States are hereby enacted." (Quoted in American Dredging Co., *supra*, 338 F. 2d 841; emphasis added). The word "jurisdiction" appears in Sections 1, 2, 4, 5, 7 and 13 of the Act. 29 U.S.C. 101, 102, 104, 105, 107 and 113 (1964). Also, note statement of Mr. Justice Frankfurter in his concurring opinion in United States v. United Mine Workers, *supra* (1947) 330 U.S. 258, 91 L. Ed. 884 at 313. *"Again and again the statute says 'no court shall have jurisdiction,' or an equivalent phrase.* Congress was concerned with the withdrawal of power from the *federal* courts to issue injunctions *in a defined class of cases.*" (emphasis added).

jurisdictional limitations enacted by Norris-LaGuardia, stated, at page 215:

> "The District Court was correct in dismissing Count 3 of petitioner's complaint for *lack of jurisdiction* under the Norris-LaGuardia Act." (emphasis added).

In *General Inv. Co.* v. *New York Cent. R.R.* (1926) 271 U.S. 228, 70 L.Ed. 920, this Court stated, at page 230:

> "By jurisdiction we mean power to entertain the suit, consider the merits and *render a binding decision thereon* . . ." (emphasis added).

Likewise, in deciding a jurisdiction issue in *Minnesota* v. *Northern Sec. Co.* (1904) 194 U.S. 48, 48 L.Ed. 870, this Court said, at page 63:

> "We proceed, therefore, to inquire whether the Circuit Court could take cognizance of this case upon removal from the state court, and *make a final decree upon the merits.*" (emphasis added).

The Court observed that since the suit did not "involve a dispute or controversy within the jurisdiction of the Circuit Court *for the purposes of a final decree,*" it should not have been dismissed by the District Court but should have been remanded to the state court. 194 U.S. at 72 (emphasis added).

By way of dicta in earlier cases, the Court has repeatedly described Norris-LaGuardia as denying "jurisdiction" to federal courts.[37]

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[37] In Marine Cooks and Stewards v. Panama S.S. Co., (1960) 362 U.S. 365, 4 L. Ed. 2d 797, the Court stated that: "Section 4 of [Norris-LaGuardia] specifically denies jurisdiction to District Courts to issue any restraining order . . ." (362 U.S. at 366) and further stated, at page 372, "All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown." See discussion and citation of similar cases in American

The court below stated that:

> "The Federal Courts are denied the power to grant injunctive relief under the provision of Section 4 of the Act, and permitted to grant injunctive relief under the provision of Section 7 of the Act." (A. 43)

It reasoned that:

> "Under Section 7 of the Norris-LaGuardia Act, Federal Courts may grant injunctions under certain enumerated circumstances. Professor Chafee cogently argued that if Federal Courts have no subject matter jurisdiction, then how can the Court sit without jurisdiction until certain facts are proved and then decide whether it has the power to act? The answer is, jurisdiction attaches from the beginning or not at all." (A. 45)

It is submitted that such reasoning leads to an unrealistic and erroneous conclusion. It is true that Section 7 makes an exception to its general prohibition against federal court injunctions when certain specified facts are alleged. The presence or absence of jurisdiction under Section 7 is normally determined by examining the complaint. *Grace Co.* v. *Williams* (CA 8; 1938) 96 F. 2d 478. The Bill of Complaint in the instant case, filed with the Chancery Court of Tennessee, did not allege the jurisdictional prerequisites enumerated in Section 7. (A. 2-10) Therefore, the District Court in Tennessee had no jurisdiction under Section 7 to grant injunctive relief in the instant case.

It is patently erroneous to assume that a civil action is one "of which the District Courts have original jurisdiction founded on a claim or right arising under the . . . laws of

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Dredging Co., *supra*, 338 F. 2d at 851-52. In Sinclair, *supra* (1962) 370 U.S. 195, 227, 8 L. Ed. 2d 440, 458, Mr. Justice Brennan, in his dissenting opinion, stated: "But if §4 is to be read literally, removal will not be allowed." Accord: *Moore, Federal Practice*, 2d Ed., Vol. 1, Sec. 0.60[1], p. 603.

the United States," merely because the District Court has jurisdiction in a suit filed with it in which a labor injunction is sought, to examine the complaint and determine whether the requisite jurisdictional facts under Section 7 have been alleged. The fact that a court always has initial jurisdiction to determine its own jurisdiction does not necessarily mean that every action filed with the court is one over which the court has "original jurisdiction." In the absence of diversity or jurisdictional amount, for example, the federal court may lack jurisdiction over the cause despite the fact that it necessarily has jurisdiction to determine whether the jurisdictional prerequisites established by the Constitution or Congress have been alleged. See *Thomson* v. *Gaskill* (1942) 315 U.S. 442, 86 L.Ed. 2d 951; *Robertson* v. *Railroad Labor Bd.* (1925) 268 U.S. 619, 69 L.Ed. 1119.

Similarly, in *United States* v. *United Mine Workers*, *supra* (1947) 330 U.S. 258, 91 L.Ed. 884, this Court concluded that "[a]ssuming . . . the Norris-LaGuardia Act applied to this case and prohibited injunctive relief," the District Court not only had jurisdiction to determine its own jurisdiction, but also "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." 330 U.S. at 295 and 293.

In a further effort to establish jurisdiction in the District Court under Section 301 despite Norris-LaGuardia, the court below reasoned that:

> "The relief prayed for was an injunction and general relief. If Avco had not asked for general relief, it would have been entitled to any appropriate relief, other than an injunction, under Rule 54(c), Federal Rules of Civil Procedure. Under the Rules of Civil Procedure, federal courts in their discretion may grant relief of a kind not requested in the pleading of either party. [Citing case]." (A. 45-46)

In an earlier portion of this brief, it was pointed out that the prayer for "general relief" in the instant Bill of Complaint was meaningless under Tennessee Chancery Court practice, and that the Tennessee court would have dismissed the cause if it had concluded that injunctive relief was not justified, without retaining jurisdiction to consider the possibility of some other form of relief, such as money damages. (Page 8, *supra*) [38] Assuming that the Bill of Complaint sought only injunctive relief, it seems clear for reasons detailed above, that the suit should not be removable under Section 1441(b).

In an effort to justify jurisdiction, however, the Court of Appeals invoked Federal Rule 54(c). Reliance on the rule simply begs the question. If, as the Petitioner contends, the cause was not removable, Rule 54(c), which applies only to federal proceedings, would be inapplicable and could not possibly be resorted to to bolster an otherwise absent jurisdiction. In any event, as pointed out by Judge Kalodner in *American Dredging Co., supra* (CA 3; 1964) 338 F. 2d 837, Rule 82 specifies that, "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein." 338 F. 2d at 848.

Reliance on Rule 54(c) seems impermissible for another reason. In *Great Northern R.R.* v. *Alexander* (1918) 246 U.S. 276, 62 L.Ed. 713, it was held that in determining removability the allegations of the plaintiff's pleading in the state court control and that:

> ". . . in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to re-

[38] In a decision subsequent to Avco, the District Court below acknowledged that the prayer for "general relief" was immaterial to its decision. Oman Construction Co. v. Teamsters Local 327 (M.D. Tenn. 1966) 263 F. Supp. 181, 183.

> movability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, nonremovable when commenced, shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion." 246 U.S. at 282.

Similarly, in *Pan American Petroleum Corp.* v. *Superior Court, supra* (1961) 366 U.S. 656, 6 L.Ed. 2d 584, it was stated, at 662:

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' . . . the complaints in the Delaware Superior Court determine the nature of the suits before it."

Accord: *Gully* v. *First National Bank In Meridian, supra* (1936) 299 U.S. 109, 81 L.Ed. 70.

Of course, the Bill of Complaint in the instant case made no reference to Rule 54(c). The rule by its terms applies only to proceedings in federal courts. To apply the rule in order to determine removability of the case would deprive the Petitioner of its right, through the allegations of its Bill of Complaint, to "determine the status with respect to removability" and thus would violate the teaching of the *Great Northern* case.

In its search for jurisdiction, the Court of Appeals stated that:

> "The strike against Aveo gave rise to a single cause of action for which any number of different remedies were available. See *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), where the Supreme Court defined cause of action as being predicated on a single wrong to plaintiff for which relief is sought. While the injunctive remedy has played an important part in the history of labor law, such close relationship between this effective remedy and the cause of action does not mean the two are coextensive. Here the complaint stated a single cause of action." (A. 45)

From the hypothesis that the complaint "stated a single cause of action," the court apparently inferred that the cause is removable under Section 1441(c), although the section is nowhere specifically referred to in the opinion. The inference is erroneous. Section 1441(c) permits removal of an otherwise nonremovable claim only when it is joined with "a separate and independent claim or cause of action, which would be removable if sued upon alone." (App. A, page 1) In the *Finn* case, cited by the Court of Appeals in the above quotation, this Court reviewed the legislative history of Section 1441(c) and stated that:

> "[w]e conclude that where there is a single wrong to plaintiff, for which relief is sought . . . there is no separate and independent claim or cause of action under § 1441 (c)." 341 U.S. at 13-14.

Thus, the Court held that where the plaintiff's pleading alleges a cause of action predicated on a single wrong for which relief is sought, Section 1441(c) is inapplicable. In the absence of 1441(c), if some part of a case predicated on a single wrong is not removable, no part of the cause is removable. "In other words, *a fragment of a cause of*

action can no longer furnish a basis for removal; one of two or more causes of action may do so." [39] It follows, therefore, that even if, through some rationalization, the Petitioner's Bill of Complaint filed in the Chancery Court is construed as setting forth a single cause of action for money damages (ordinarily cognizable in federal court under Section 301) as well as for injunctive relief (not ordinarily cognizable), the cause would not be removable under either 1441(b) or 1441(c). The reason is that the injunctive part of the single cause is not removable, and under 1441(b) and (c) this blocks removal of the entire cause or any part thereof. *American Fire & Casualty Co.* v. *Finn, supra* (1951) 341 U.S. 6, 95 L.Ed. 702.

Elsewhere in its opinion, the Court of Appeals referred to *Sinclair Refining Co.* v. *Atkinson, supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, and observed that in *Sinclair*:

> "The Court dismissed the count requesting an injunction, and the District Court, having jurisdiction over the parties and the subject matter, was free to go to trial on the merits of the count requesting damages." (A. 46)

Of course, *Sinclair* was not a removal case. The complaint was filed in the District Court. Therefore, the case throws little light on the meaning of the word "jurisdiction" as used in the removal sections of the Judicial Code of 1948. It is significant, however, that in *Sinclair*, this Court stated that it was dismissing count 3, in which injunctive relief was sought, "*for lack of jurisdiction under the Norris-LaGuardia Act.*" 370 U.S. at 215 (emphasis added). The action of this Court in dismissing the injunction suit for want of jurisdiction indicates that this Court regards a suit for injunction for breach of a no-strike clause as

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[39] *Moore, Federal Practice*, 2d. Ed., Vol. 1A, Sec. 0.162[1], p. 621.

separate and independent from an action for money damages, and does not subscribe to the view of the court below that there was "a single cause of action for which any number of different remedies were available." (A. 45) Otherwise, it would seem that in *Sinclair* the court below would have been instructed to deny the count for the injunction and go to trial on the merits of the damage count. It is interesting to note that in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers, supra* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822, the court observed in footnote 26 that in addition to the injunction suit which the plaintiff there had filed in the state court, the plaintiff had also filed two separate actions for damages against the defendants. 338 F. 2d at 849. As the damage claims had not been *joined* in the same suit with the injunction claims, however, no problem under Section 1441(c) was presented.

If, contrary to the contentions of this Petitioner, it should be found that the Bill of Complaint below joined *two separate and independent claims*—one for injunctive relief and the other for money damages—so that the language of Section 1441(c) might arguably become operative, the decision of the court below would still have to be reversed. Assuming that the separate and independent damage claim would be removable because of the effect of Section 301, this Court would have to reconcile Section 1441(c) with the provisions of Norris-LaGuardia. This Court has held in *Sinclair, supra,* that the federal court lacks jurisdiction to grant injunctive relief for a strike in breach of contract and that such a claim must be dismissed for want of jurisdiction. It would seem unreasonable, therefore, to construe 1441(c) as bringing along with the

damage action a separate and independent injunction suit over which the District Court would have jurisdiction, despite Norris-LaGuardia and the earlier holding in *Sinclair*. There is no reason to believe that when Congress enacted the removal sections of the Judicial Code of 1948, it intended thereby to make a narrow exception to the general operation of Norris-LaGuardia and permit a district court to enjoin a strike in a breach of contract if the case has been removed to district court under Section 1441(c), but under no other circumstances.[40] As there is no jurisdiction over the injunction suit it must be remanded even though the damage action has been removed.

The two statutes could also be reconciled by holding that it would be an abuse of the discretion permitted by Section 1441(c) for a district judge not to remand the injunctive part of the action where he could not grant injunctive relief because of Norris-LaGuardia.

Whenever a case has been "removed improvidently and without jurisdiction," it is the duty of the district court to remand. Judicial Code of 1948, Section 1447(c), 62 Stat. 939, as amended, 63 Stat. 102 and 78 Stat. 266, 28 U.S.C. 1447(c) (1964) [41] In the instant case, the District

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[40] If the Court should hold, however, that this narrow exception exists, and that the District Court had jurisdiction to enjoin the strike in the instant case, the court below was clearly in error in affirming the action of the District Court dissolving the state court injunction on the theory that Norris-LaGuardia now applies to state courts, and substituting no federal injunction in its place. Indeed, it would have been an abuse of discretion for the District Judge to have done so.

[41] Illustrative is Direct Transit Lines, Inc. v. Starr (CA 6; 1955) 219 F. 2d 699. In Swift & Co. v. United Packinghouse Workers (D. Colo. 1959) 177 F. Supp. 511, where the plaintiff prayed in the state court for both injunction and money damages, and the action was removed, the District Court remanded the suit for injunction and retained jurisdiction over the damage action. *Cf.* National Dairy Products v. Heffernan (E.D.N.Y. 1961) 195 F. Supp. 153. In addition, suits seeking to enjoin strikes in breach of contract or other labor disputes have been remanded in H. A. Lott, Inc. v. Construction and General Laborers Local 145 (S.D. Miss., Jackson

Judge for the Middle District of Tennessee, Nashville Division, should have granted the Petitioner's Motion to Remand. (A. 14)

CONCLUSION

For the reasons stated above, the judgment of the court below should be reversed and the cause should be remanded with directions to reverse the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, reinstate the injunction improvidently dissolved by that court, and remand the cause to the Chancery Court for Davidson County, Tennessee, from

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Division, September 29, 1967), Civil Action No. 4136, unreported; California Packing Corp. v. ILWU Local 142 (D. Hawaii 1966) 253 F. Supp. 597; Kroger Co. v. Milk and Ice Cream Drivers Local 98 (S.D. Ohio 1966) 61 LRRM 2692; Kroger Co. v. Retail Clerks Int'l Ass'n (S.D. Ohio 1964) 56 LRRM 2893; Merchant's Refrigerating Co. v. Warehouse Union Local 6 (N.D. Cal. 1963) 213 F. Supp. 177; Castle & Cooke Terminals, Ltd. v. Local 137, Int'l Longshoremen's Union (D. Hawaii 1953) 110 F. Supp. 247; Sandsberry v. Gulf C. & S. F. Ry. (N.D. Tex. 1953) 114 F. Supp. 834; Hat Corp. of America v. United Hatters (D. Conn. 1953) 114 F. Supp. 890; Associated Telephone Co. v. CWA (S.D. Cal. 1953) 114 F. Supp. 334; American Optical Co. v. Andert (W.D. Mo. 1952) 108 F. Supp. 252. Articles and comments of legal scholars favoring remand, include the following: Janofsky & Vaughn, *The Affirmative Role of State Courts to Enjoin Strikes in Breach of Contract*, 7 B.C. Ind. & Com. L. Rev. 869 (1966); Lesnick, *State Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 Harv. L. Rev. 757 (1966); Moskowitz, *Enforcement of No-Strike Clauses by Injunctions*, 46 Boston U. L. Rev. 343 (1966). *Comments:* 36 U. Cin. L. Rev. 702 (1967); 6 B.C. Ind. & Com. L. Rev. 957 (1965); 65 Colum. L. Rev. 907 (1965); 17 Mercer L. Rev. 442 (1966); 41 Notre Dame Lawyer 88 (1965); 113 U. Pa. L. Rev. 1096 (1965).

which it was removed by the Respondents. The Petitioner also prays that it have its costs expended herein.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Section 1441 of the Judicial Code of 1948 (28 U.S.C. § 1441 (1964), 62 Stat. 937) provides:

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1447 of the Judicial Code of 1948 (28 U.S.C. § 1447 (1964), 62 Stat. 939, amended May 24, 1949, 63 Stat. 102, and July 2, 1964, 78 Stat. 266) provides in relevant part:

> § 1447. Procedure after removal generally
>
> * * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Section 1 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 101 (1964), 47 Stat. 70) provides:

§ 101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 2 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 102 (1964), 47 Stat. 70) provides:

§ 102. Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom

of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 4 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 104 (1964), 47 Stat. 70) provides in relevant part:

> § 104. Enumeration of specific acts not subject to restraining orders or injunctions
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

Section 7 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 107 (1964), 47 Stat. 71) provides:

> § 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected

persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the

unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Appendix A

Section 13 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 113 (1964), 47 Stat. 73) provides:

§ 113. Definitions of terms and words used in chapter.

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing,

or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185 (1964), 61 Stat. 156) provides:

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to

have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION, *Petitioner,*

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief for The Chamber of Commerce of the United States and American Trucking Associations, Inc. as Amici Curiae

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Brief for The Chamber of Commerce of the United States and American Trucking Associations, Inc. as Amici Curiae

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States is a federation of over 3,700 national, local and state chambers of commerce and trade and professional associations. The National Chamber has a direct membership of more than 33,000 business firms and an underlying membership

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[1] This brief is filed with the written consent of both parties, pursuant to Rule 42(2) of the court's rules.

of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

American Trucking Associations, Inc. is a national organization representing the motor freight industry on whose behalf it customarily appears before federal agencies and, where issues of national importance are involved, before the federal courts.

Many thousands of the employers represented by the National Chamber and American Trucking Associations are parties to collective bargaining agreements which fix the terms and conditions of employment for many hundreds of thousands of employees. This court's decision in the present case will affect a great many of these agreements and will determine, in a critical respect, the extent to which they are effective instruments to achieve stability in industrial relations.

ARGUMENT

Introduction

It seems impossible to over-emphasize the seriousness of the error committed in this case by the court below. The decision reached by that court, and by the federal district courts that have reached the same result, undermines—indeed, it reverses—the intent of Congress in enacting § 301 of the LMRA. It demeans the role of the states in an area where Congress had no purpose at all to demean it, but on the contrary intended to supplement and support it. It misreads the vastly important opinions of this court dealing with § 301. Without justification in law or equity it insulates from the sanction of an injunction, granted by many states, breaches by unions and/or employees of solemn pledges they give in their collective bargaining contracts not to strike or picket over their grievances, but rather to arbitrate them, during the term of the contract.

Almost all of Judge Celebrezze's opinion for the court below denying remand, which is very similar to the opinions of the district courts which deny remand, is devoted to an argument in favor of the conclusion that the employer's suit in the state court comports with the provisions of § 1441(b) of the removal statute, i.e., that it is a civil action (a) "arising under the . . . laws of the United States" of which (b) "the district courts have original jurisdiction," and thus that the suit can be removed to federal court. But the implication of this conclusion is very troubling indeed. The implication is that, since the federal court cannot issue an injunction against the strike in breach of contract the employer can be deprived of his only effective remedy, which is available to him in the state court, simply by virtue of the removal statute which could never have been intended to have so profound and unlooked for an effect. Apparently sensing how very troubling this implication is, the court shifts its ground. It raises the specter of non-uniformity. It states:

> "If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity in application, the remedies available in State Courts are limited to the remedies available under Federal law."

The conclusion of no remand follows immediately.

Thus, the court below says that the removal statute has the practical effect of nullifying state court jurisdiction to issue an injunction, but that this startling application of the removal statute is not, in fact, as drastic as it would appear, because even though the removal statute has this effect, or even if it does not, nothing is lost since the state court could not, by reason of § 301, grant an injunction after all.

The court below justifies this enormously important conclusion—that § 301 took away from the states their right to enjoin strikes in breach of contract—by citation, and very brief quotation and discussion, of two cases, *Sinclair*[2] and *Lucas Flour*[3], and by nothing else. But these cases do not support the conclusion. A proper analysis of these cases—and of other cases and of the statute and its legislative history, mostly ignored by the court below—shows clearly that the states were not ousted by § 301 of their jurisdiction to issue injunctions against strikes in breach of contract. We proceed now to demonstrate in detail that this is so. We thus pass for the present a discussion of the removal question, which, in the final analysis, is wholly bound up with the issue of the effect of § 301 on state court jurisdiction to enjoin strikes in breach of contract.

I

Section 301 Does Not Withdraw State Court Jurisdiction To Enjoin Strikes in Breach of Contract.

The *Sinclair* case does not, contrary to the view of the court below, support the conclusion that § 301 has withdrawn the jurisdiction of states to enjoin strikes in breach of contract. The essence of the ruling in that case is this *and only this:* Congress in passing § 301 did not expressly, or by any intimation or implication that may be drawn from the language or legislative history of the statute, overrule or modify the Norris-LaGuardia Act, and thus § 301 did not return to the federal courts any of the jurisdiction which Norris-LaGuardia withdrew from them. It seems to us indisputable that the converse of the ruling that Norris-LaGuardia was not *restricted* by § 301 is and has to be that it was not *extended* by it either. In other words, when it enacted § 301 Congress left the Norris-La-

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[2] *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962).

[3] *Teamsters Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962).

Guardia Act exactly where it found it. Thus employers, if they want Norris-LaGuardia restricted in its application in § 301 cases in the federal courts, must go to Congress to get specific authorization for such restriction. By the same tokens, unions, if they want Norris-LaGuardia extended to the state courts, must go to Congress to get specific authorization of such extension. See also Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia,* 79 Harv. L. Rev. 757, 759-760 (1966):

> "Since a uniform rule *permitting* specific enforcement of no-strike clauses was rejected, not as a result of the Court's own fashioning of an appropriate rule of federal labor law, but simply in obedience to the legislative mandate that federal judges not enjoin strikes, that rejection (proper though it was) should not now be parlayed with a revived interest in practical accommodations and judicial creativity to compel the states to obey a mandate never addressed to them." [Footnotes omitted].

The other case relied on by the court below for its conclusion that § 301 took away state court equity jurisdiction in no-strike clause cases is *Lucas Flour.* That case and its forbear, *Lincoln Mills,*[4] stand for two related but distinct propositions. Stated in a shorthand which, given the complexity of the subject, is drastically over-simplified, the two propositions are (1) that § 301 law as fashioned by the Congress and the courts is "federal" law and (2) that there must be a certain "uniformity" in the content and application of that law. From nothing more than this over-simplified shorthand the court below, and other courts that have denied remand, drew two related but distinct conclusions. The first conclusion is that, because there is a federal statute (The Norris-LaGuardia Act) which withdraws from the federal courts jurisdiction to issue injunctions, this statute must be part of the federal law of § 301

[4] *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

applicable in state and federal courts alike. The second conclusion is that in order to serve the principle of uniformity the restriction on injunctions against strikes in breach of contract imposed upon the federal courts must be extended to the state courts.

These two facile conclusions have, to be sure, a surface appeal, especially to unions or employees acting in defiance of their union who have violated, or have it in mind to violate, their pledge to arbitrate their grievances rather than to strike over them. But they cannot withstand analysis. Specifically, the "federal law" principle properly understood does not support the conclusion that Norris-LaGuardia is part of § 301 law, and the "uniformity" principle properly understood does not support the conclusion that § 301 withdraws state court equity jurisdiction in no-strike clause cases.[5]

This court in *Lincoln Mills* recognized that no pat formula governs the task of deriving and applying federal law in § 301 cases. 353 U.S. at 457. It also recognized, and *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), confirmed, the important role to be played by state law and the state courts in shaping and applying the federal law of § 301.[6] Nothing in the language of *Lincoln Mills* makes either necessary or appropriate the addition to

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[5] Lesnick, *State-Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 Harv. L. Rev. 757, 758 (1966): "Section 301, it is clear, does apply to state courts. *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). I believe, however, that the federal law of Section 301 should not be held to 'incorporate' the Norris-LaGuardia Act's prohibitions on injunctions against strikes in breach of contract. Of course Norris-LaGuardia is 'federal law,' and 'federal law' controls. But to settle the question so simply comes close to adjudication by pun."

[6] Compare the following statement of the court below: "Federal Courts are solely responsible for developing a single, consistent body of Federal labor law."

§ 301 law of the Norris-LaGuardia restrictions on federal court jurisdiction.[7] Nor does anything in that case justify the simplistic assumption that the Norris-LaGuardia Act was made a part of § 301 by Congress or must be made a part of it by the courts merely because it is a federal statute in the labor law field. Furthermore, and most important of all, *Lincoln Mills* and its progeny teach that the heart and soul, and indeed virtually the whole content of the federal law of § 301, is the promotion of the enforcement of contracts and the settling of contractual disputes by peaceful means. The peaceful method of settling disputes that Congress had most in mind was arbitration, to be supported and confirmed by court action. Federal court jurisdiction was added to existing state court jurisdiction by Congress to promote, not to debilitate—and the state and federal courts were charged by Congress to promote, not to debilitate—the enforcement of contracts and the peaceful settlement of contractual disputes. Thus the presumption is wholly against the withdrawal by Congress from the state courts of the right to enjoin strikes in breach of contract absent an explicit withdrawal of that right. There is no explicit withdrawal of that right either in the language or the legislative history of § 301. On the contrary, as the other briefs in this case which seek reversal of the court below show, and as *Dowd Box* also shows, the evidence in the statute and the legislative history is all the other way, and very affirmatively so.

As for the "uniformity" principle: That principle, as espoused in *Lucas Flour* and succeeding cases, does not at all require that state courts be denied the right to issue injunctions against strikes in breach of contract simply because federal courts are without jurisdiction to do it, or for any other reason. This court's reasoning in *Lucas Flour* respecting uniformity was predicated upon the

[7] And, indeed, as we have shown, *Sinclair*, properly read, shows affirmatively that Norris-LaGuardia is not a part of § 301 law.

proposition that parties to a collective bargaining agreement could not tolerate a situation in which they could not be sure what their rights and duties under the agreement were, or if they were negotiating an agreement, what they were agreeing to. The fact that the injunctive remedy for breach of the no-strike clause is available in one court and not in another does not present that problem. Furthermore, *Lucas Flour* and succeeding cases in which the uniformity principle was invoked show that the essential purpose of the principle is to serve the basic substantive purpose of § 301 law, namely, promoting the enforcement of contracts and settlement of disputes by peaceful means. The court below wholly misconstrued the uniformity principle when it gave it the barren content of uniformity for uniformity's sake and invoked it in the service of a result which frustrated rather than promoted the basic statutory purpose. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), not cited by the court below, should have laid to rest any notion that the uniformity principle means uniformity for uniformity's sake. Neither § 301 nor any of the cases which interpret it require the tidy and altogether pointless uniformity which the court below found to be unavoidable.

The neglect by the court below of the *Dowd Box* case is noteworthy. The court gave the case grudging recognition in a single sentence: "While State courts may [sic] have concurrent jurisdiction they are bound to apply Federal law." It must be said that had the court given the case the attention it demands and deserves, it could not have come so easily to the conclusion it reached, or, indeed, have reached it at all. The case, which analyzes the legislative history of § 301 at great length, compels the conclusion that Congress, by giving the federal courts jurisdiction in collective bargaining contract cases and in the process imposing upon the courts, state and federal, the duty of fashioning federal law to promote the fair and peaceful enforcement and administration of those con-

tracts, had in mind *not at all* to take away from the state courts any of the jurisdiction they already possessed in this area to carry out that purpose. It shows clearly that Congress intended simply to add to the means of carrying out that purpose by giving jurisdiction to the federal courts in order to fill a jurisdictional gap which existed in some state courts, so that unions and employees would nowhere be immune from judicial review and enforcement of their obligations under collective bargaining contracts.

In *McCarroll* v. *Los Angeles County District Council of Carpenters,* 49 Cal. 2d 45, 315 P. 2d 322 (1958) *cert. denied,* 355 U.S. 932 (1958) which forecast this court's rulings in *Lucas Flour, Dowd Box,* and *Sinclair,* Justice Traynor stated the matter with complete justice and accuracy:

> "We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301."

The court below viewed with disfavor the prospect that, assuming the continuing existence of state court equitable jurisdiction and/or the obligation of federal courts to remand removed collective bargaining contract cases, "State Courts would become the preferred forum for adjusting breaches of no-strike clauses." No doubt an employer, if a strike in breach of a no-strike clause lasts any length of time, will contest the breach in a state court rather than a federal court where the state grants the injunction remedy. But this is wholly *consistent* with the concurrent jurisdiction enacted by Congress and recognized by *Dowd Box.* It would not, in the words of the court below, "undermine a uniform development of the law." Any suggestion that the state courts are more likely to

misconceive or misapply § 301 law in interpreting no-strike provisions than are the federal courts, and thus must not be trusted with the task of interpreting them, is wholly *inconsistent* with the concurrent jurisdiction enacted by Congress and recognized by *Dowd Box*. Section 301 cases in this court since *Lincoln Mills* show that there has been no greater (or lesser) misunderstanding or misapplication of § 301 law by the state courts than by the federal courts. The cases show the state courts are no less hospitable to the principles of *Lincoln Mills* and *Lucas Flour* than the federal courts. They also show that this court, acting wholly in the spirit of *Dowd Box*, harbors no presumption that the state courts are or will be less hospitable to this court's mandates in this area than will the federal courts.

To the extent that a judgment that it would be better for state courts not to have the power to enjoin strikes in breach of contract, lest they on occasion mistakenly or invidiously abuse it, underlies the decision of the court below and other courts that have denied remand, see *Tri-Boro Bagel Co.* v. *Bakery Drivers Union*, 228 F. Supp. 720 (D.C.E.D.N.Y. 1963), the response must be that Congress not having made that judgment the courts may not act on it. See *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. at 214-215. Moreover, we should suppose that, where a union and its members have pledged not to strike or picket over their grievances, and then do so, the presumption would be in favor of prompt and effective sanctions to enjoin the breach. Considering how great is the breadth of the undisputed state court jurisdiction in the area of interpretation and enforcement of collective bargaining contracts, and considering also the fact that the state courts have undisputed jurisdiction to issue injunctions against strikes and picketing in certain instances, i.e., to restrain violence, *Youngdahl* v. *Rainfair*, 355 U.S. 131 (1957), there is no basis for any contention that the courts should, in contravention of the intent of Congress, mistrust the states to make proper application consistent with § 301 of the

injunction remedy against breaches of no-strike clauses. There is no indication in the present case, for instance, that the union considered the strike not to be in breach of the contract. When it removed the case to the federal court it appears to have done so only in order to take advantage of what it saw as a procedural nicety which exonerated it from the injunctive sanction against the breach of its contractual obligation, not to defend itself from an unjust injunction. Moreover, it is undoubtedly the case, as distinguished representatives of unions have stated, that few of the strikes which are alleged to be in violation of contract are authorized, sanctioned or supported by the bargaining representative. *Report of Special Atkinson-Sinclair Committee,* in ABA Section of Labor Relations Law Proceedings, Part II, 226, 233 (1963). It would seem that, far from being mistrusted, state court injunctive sanctions against such strikes should be encouraged. A prompt and effective injunction against a wildcat strike and picketing is often as important to the union as it is to the employer, for it enables or assists the union to discharge its contractual obligations and to reassert its position as the exclusive bargaining agent.[8]

The court below, wrestling with its self-created dilemma caused by its misreading of the *Sinclair* case and apparently troubled by the vacuum that its decision, if upheld, would create, said in a footnote, citing *Sinclair:* "An employer may obtain an order directing a Union to comply with its agreement to arbitrate. A strike in the face of such an order could result in contempt proceedings." Other commentators who, like the court below, oppose state court injunctions against breaches of no-strike clauses as contrary to § 301 or as otherwise somehow unfitting, but who are also troubled by the implications of their position, suggest the possibility of other alternatives. Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 Colum. L. Rev. 1027, n. 84 (1963). It may

[8] In this connection, the union's three week delay in seeking removal after the issuance of the state court injunction in this case (A. 10, 11) appears to be worthy of note.

be anticipated that the unions appearing in this case will suggest still other alternatives. Yet all such proposals raise problems at least as serious as those said to be raised by state court injunctions, as for example, whether the proposed solution will be effective, whether it comports with the collective bargaining contract it is meant to defend, or whether it is any more exempt from the strictures of the Norris-LaGuardia Act than is the state court injunction procedure. See *International Longshoremen's Association, Local 1291* v. *Philadelphia Marine Trade Assoc.*, — U.S. — (Nov. 6, 1967). Furthermore, none of the proposed "solutions" can fairly be said to be any more consistent with the purpose of § 301 than the state court injunction procedure, which is perfectly consistent with it and which, as cannot be said too often, Congress has not challenged or restricted in any way.

II

The Court Below Erroneously Read the Removal Statute To Defeat the State Court's Jurisdiction To Enjoin the Strike in Breach of Contract.

We submit that the conclusion is inescapable that when Congress, in furtherance of its policy of promoting enforcement of collective bargaining contracts and settlement of contract disputes by peaceful means, made the federal courts an additional forum for suits for violation of such contracts, it had no purpose whatever to deprive state courts of the undoubted jurisdiction they possessed in this area, but intended only to supplement that jurisdiction. We have shown that *Lincoln Mills, Lucas Flour, Dowd Box* and *Sinclair* affirmatively support this proposition. To read the removal statute, as the court below did, to defeat state court jurisdiction to enjoin strikes in breach of contract, and thereby to deny the remedy, clearly defeats the Congressional purpose. *American Dredging Co.* v. *Local 25, Operating Engineers*, 338 F.2d 937 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965), and the other briefs herein

which seek reversal of the court below, demonstrate that the removal statute neither required nor justified the denial of remand. The court below attempted to justify its reading of the removal statute by concluding that if petitioner's suit were remanded the state court would be without jurisdiction to enjoin the strike. But this conclusion contravenes § 301 and the Congressional purpose to preserve state court jurisdiction in the same way and to the same extent as the conclusion it is meant to justify contravenes them. The essential fact of the matter is that the result reached by the court below cannot stand in the face of the Congressional intent, clearly embodied in § 301 and its legislative history, not to withdraw state jurisdiction to enjoin strikes in breach of collective bargaining agreements, but rather to supplement existing state remedies and thus ensure the full enforceability of such agreements.

CONCLUSION

The judgment of the court below denying remand should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION, *Petitioner,*

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION, *Petitioner*,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether an action brought in a state court for alleged breach of a no-strike promise in a collective bargaining agreement between an employer and a union representing employees in an industry affecting interstate commerce, in which the employer seeks a strike injunction, is removable to a federal district court in

that, as a Labor Management Relations Act § 301 action, it is within the "original jurisdiction" of the district court and is "founded on a claim or right arising under the . . . laws of the United States. . . ."

STATEMENT

On October 15, 1965, petitioner filed a complaint in the Chancery Court for Davidson County, Tennessee, against Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, nine individuals who held offices or lesser posts in the Union, and eleven individuals who were members of the Union (R. 2-3). The complaint alleged that: Petitioner at its plant at Nashville, Tennessee, manufactures and assembles major components for military aircraft under subcontract from prime contractors (R. 4-5). The Union is the exclusive bargaining representative of the 2,000 production and maintenance employees at the plant (R. 4-5). A collective bargaining agreement between the parties dated June 21, 1965 prescribes a method for settling grievances, including provision for binding arbitration (R. 5-6). Article IX of the agreement provides that: "Grievances are herein defined as any alleged violation of the terms of this Agreement or any difference of opinion arising as to its interpretation or application. Should any grievance, as defined herein, arise, there shall be no suspension of work and an earnest effort shall be made to settle such difficulties promptly in the manner hereinafter outlined" (R. 5-6). Article XIII of the agreement provides that: "During the life of this Agreement, no work stoppages, strikes or slow downs shall be caused or sanctioned by the Union and no lockouts shall be made by the Company" (R. 8).

The complaint further alleged that "members" of the Union engaged in a series of stoppages shortly after the effective date of the agreement (R. 6). On July 29, 1965 ten employees engaged in a stoppage because of their dissatisfaction with the reprimand of an employee (R. 6). On August 3, 1965 six employees walked off the job in protest against the use of tests for determining the eligibility of employees for promotion (R. 6). On August 11, 1965 fifty employees walked off the job, and on August 12, 1965 "numerous employees" engaged in a stoppage, to protest the termination of a probationary employee (R. 6). Two months later, on October 7 and 11, "a number of employees" failed to report, and on October 12 walked off the job, in a job classification dispute (R. 7). On October 14, 1965, 100 employees walked off the job to protest the presence of time study engineers in their work areas (R. 7). A plant-wide strike "of all or nearly all employees" began on October 15, 1965 (R. 7).

The complaint further alleged that "officers or committee men . . . were included in the groups of employees" engaged in the stoppages "on a majority of the occasions . . ."; that "in the walkouts of October 14 and . . . 15, officers, committee men, and other officials . . . were involved"; and "hence" the work stoppages and strikes were "sanctioned" by the Union (R. 8). Petitioner prayed that a "temporary injunction issue and be made permanent on the hearing" enjoining the defendants, "their members, associates, agents, and confederates," from engaging in or inducing, for the term of the collective bargaining agreement ending on June 20, 1968, "any suspension of work or any interruption of complainant's operations, and from acting individually, or in concert with others, to interfere with

the normal conduct of complainant's business at its plant at Nashville, Tennessee" (R. 9). Petitioner also prayed for "general relief" (R. 9).

The complaint was filed on the same day that the strike took place and an *ex parte* injunction was issued forthwith as prayed (R. 10), with no notice or opportunity to be heard extended to the Union or other defendants. The injunction ran not only to the Union and its agents, but to all members as well, and it ran to them not only when acting in concert, but also when acting individually (R. 9). The injunction was not limited to a suspension of work over matters submissible to the grievance and arbitration procedure. Nor was the injunction limited to a suspension of work, but extended to "any interruption of operations," and any interference with the "normal conduct" of business (R. 9).

On November 5, 1965 the Union and other defendants filed a petition with the United States District Court for the Middle District of Tennessee to remove the action, averring that (1) petitioner's activities affect interstate commerce and its employees are in an industry affecting interstate commerce, (2) the basis of the action is an alleged violation of a no-strike clause of a collective bargaining agreement between petitioner and the Union, and (3) the action is therefore founded on section 301 of the Labor Management Relations Act, 1947, and hence is within the jurisdiction of the federal court and arises under the laws of the United States (R. 11-12). On November 12, 1965, the Union and other defendants moved to dissolve the injunction and dismiss the action on the ground that the conduct complained of involves or grows out of a labor dispute and

the issuance of a strike injunction is barred by section 4 of the Norris-LaGuardia Act (R. 13). On February 2, 1966, the Union and other defendants moved, in the event the action were not dismissed, "to stay further proceedings therein for failure of the plaintiff to pursue the remedy of arbitration for the alleged violation of the agreement, as provided by Article IX of the Agreement . . ." (R. 15). Meanwhile, on November 18, 1965, petitioner had moved to remand the proceeding, urging that (1) the suit "is founded upon a claim of breach of contract arising under state law", and (2) by virtue of section 4 of the Norris-LaGuardia Act, the court "has no jurisdiction of said suit" (R. 14).

On March 2, 1966, the District Court denied the motion to remand (R. 17, 22). It held that the action arises under a law of the United States in that it is founded upon section 301 of the Labor Management Relations Act, 1947 (R. 18-19). ". . . [A]ll rights and claims resulting from a collective bargaining agreement in an industry affecting interstate commerce arise under federal law; state law does not exist as an independent source of private rights in regard to collective bargaining contracts" (R. 19). The District Court further concluded that the action was within its original jurisdiction (R. 19-22). It explained that "the mere fact that a prohibited labor injunction is among the remedies sought does not mean that a district court lacks original jurisdiction over the cause of action for the purpose of awarding other relief" (R. 19). In this case, the prayer asked for "general relief" in addition to an injunction, which is a sufficient basis "for awarding damages and, perhaps, for compelling specific performance of the arbitration provision" (R. 20-21); and, in any event, by reason of Rule 54(c) of the

Federal Rules of Civil Procedure, "a prayer for an injunction constructively acts as a prayer for all appropriate relief" (R. 21-22).[1]

Turning to the motion to dissolve the injunction and to dismiss the action, the District Court ruled that the motion to dissolve is well taken but the motion to dismiss is not, and it therefore denied the motion to dismiss but dissolved the injunction (R. 22). The *ex parte* injunction thus remained in force for four and one-half months before it was terminated.

The Court of Appeals affirmed (R. 38-48). As to the "arising under" prerequisite for removal, the court ruled that there is no law but federal law on which the action can be based (R. 41-42). As to the "original jurisdiction" prerequisite for removal, the Court ruled that the "Norris-LaGuardia Act does not deny to Federal Courts jurisdiction over the parties or subject matter" (R. 43), and that the preclusion of a strike injunction is a limitation upon the federal court's exercise of equity jurisdiction unrelated to subject matter jurisdiction (R. 43-45). "The strike against Avco gave rise to a single cause of action for which any number of different remedies were available" (R. 45),

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[1] On a motion for reconsideration, petitioner urged that the District Court should not apply "federal procedure law" but "Tennessee law" in reading the complaint, and that under Tennessee law a prayer for general relief does not authorize the grant of any but injunctive relief (R. 23). In denying the motion, the District Court ruled that, even were it required to apply Tennessee law, under that law "a complainant who has prayed for general relief is entitled to any relief appropriate to the pleading and proof, whether or not he has specifically prayed for such relief . . . . The only exception to this rule is that relief so inconsistent with the special prayer as to take a defendant by surprise cannot be granted" (R. 36).

and a federal court is authorized to grant whatever relief is appropriate to redress the wrong whether the complaint asks for it or not (R. 45-46). The court concluded that (R. 47-48):

> If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity of application, the remedies available in State Courts are limited to the remedies available under Federal law.
>
> Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The Congress has declared that injunctions shall not issue to restrain peaceful picketing.

SUMMARY OF ARGUMENT

I

Removal is mandatory upon a defendant's petition whenever the action is within the "original jurisdiction" of the federal court and is founded on a claim "arising under" the laws of the United States. Each prerequisite is easily satisfied in this case.

An action for breach of a collective bargaining agreement in an industry affecting interstate commerce is based on, and can only be based on, section 301 of the Labor Management Relations Act, 1947. Section 301 is the sole source of right that petitioner can invoke. Federal law is the exclusive determinant of the validity,

interpretation, and enforcement of the contract which petitioner alleges has been violated. The action therefore is one "arising under" a law of the United States.

A § 301 action is within the "original jurisdiction" of the federal court. The argument to the contrary is based exclusively on the proposition that jurisdiction is lacking because the federal court is without authority by reason of the Norris-LaGuardia Act to issue a strike injunction as one remedy available to the court should it find a contract violation. The argument confuses subject matter jurisdiction (the power to entertain a claim of contract violation) with equity jurisdiction (the authority to grant a particular form of relief to redress a well-founded claim). This distinction between subject matter jurisdiction and equity jurisdiction is central to this case and fatal to petitioner's position.

We begin with the obvious. A federal district court is empowered to decide an action in which the claim made is the violation of a labor contract. Once determined that a violation has occurred a whole host of remedies is available to the court to redress the breach. Dependent on the relief appropriate to right the wrong, the court may compel specific performance of a promise to arbitrate, enforce or vacate an arbitration award, grant compensatory damages, render a declaratory judgment, or decree other proper redress. Plainly subject matter jurisdiction exists, and it does not disappear simply because the sole relief which a particular claimant may choose to seek is a strike injunction which the court is not authorized to grant. "Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly

not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U.S. 64, 69.

The Norris-LaGuardia Act fits the distinction between subject matter and equity jurisdiction to perfection. Its terms, content, and structure show clearly that its restrictions pertain, not to the power of the court to entertain the controversy, but to the manner in which its power shall be exercised. The public policy which it declares is substantive labor policy. Its definition of a labor dispute, extending its bounds beyond disputants standing "in the proximate relation of employer and employee", expresses the operative sphere of the Act in terms of the industrial realities avowed in its statement of public policy. The outlawry of the yellow dog contract, and the prescription of standards for imposing vicarious responsibility, have direct substantive import. The safeguards which surround the grant of injunctive relief entwine purely procedural reform, traditional equity practice, and substantive considerations of sound labor policy. The description of nonenjoinable acts is carefully qualified in terms of "lawful means", absence of "fraud or violence", and "peaceably" conducted.

The entirety of the Norris-LaGuardia Act therefore bespeaks, not divestiture of power to entertain the controversy, but circumscription of the manner that the power shall be exercised. It relates to equity jurisdiction, just as this Court has related other statutes to equity jurisdiction in which the limiting command ad-

dressed to the federal court is at least as peremptory as the Norris-LaGuardia Act. The term "jurisdiction" in the Norris-LaGuardia Act "refers to right principles of judicial action and not to power." Chafee, Some Problems of Equity, 372 (1950). As this Court has stated, speaking through Mr. Justice Frankfurter, when the Norris-LaGuardia Act is interposed as an objection to the grant of injunctive relief in a federal district court, "the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its *equity jurisdiction.*" *Bakery Sales Drivers Union* v. *Wagshal,* 333 U.S. 437, 439 (emphasis supplied).

A § 301 action therefore meets the "original jurisdiction" and "arising under" prerequisites for removal. And removal of a § 301 action fits the purpose of Congress in making federal question removal available to a defendant. Without removal the federal questions presented in § 301 actions brought in state courts will be decided by state courts that may be inhospitable to or unaware of national labor policy. Federal law will be fashioned without the sustenance of federal courts and correction of state errors in the federal area will have to await the necessarily limited attention that this Court can devote to this burgeoning field. Removal is Congress' solution when the civil action begun in a state court is within the "original jurisdiction" of a federal district court and "founded on a claim or right arising under the . . . laws of the United States. . . ." 28 U.S.C. § 1441(b). A § 301 action meets these two prerequisites and removal on the defendant's petition is therefore mandatory.

II

Resistance to removal stems exclusively from this Court's decision in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, that a federal court is precluded from issuing an injunction to restrain a strike over a grievance which is submissible to arbitration under a collective bargaining agreement. But displeasure with *Sinclair* has legally nothing to do with removal. Removal is mandatory on the defendant's petition if the "original jurisdiction" and "arising under" prerequisites are satisfied. They are in this case. Nothing else is relevant. The supposed availability of a strike injunction in a state court is beside the point. "The Federal court may . . . be obliged to deny an equitable remedy which the plaintiff might have secured in a state court." *Pusey & Jones Co.* v. *Hanssen,* 261 U.S. 491, 498. The civil action does not on that account cease to satisfy the "original jurisdiction" and "arising under" requirements. Accordingly, "even if the Norris-LaGuardia Act is considered operative only as a restriction on exercises of the federal equity jurisdiction, so that the state courts are thought free to grant injunctions in labor cases otherwise and substantively governed by federal law, that difference in equity jurisprudence between the two systems is not a ground for denying the right to remove." *Crestwood Dairy* v. *Kelley,* 222 F. Supp. 614, 617 (E.D. N.Y.); *Publishers' Association* v. *Printing Pressmen's Union,* 246 F. Supp. 293, 296 (S.D. N.Y.).

Petitioner's irrelevant proposition that a state court has power to issue a strike injunction in a § 301 action is in any event erroneous. Analysis must begin with acceptance of *Sinclair* as the law. This means that

there is no longer room for the argument that "injunctions against peaceful strikes are necessary to make the arbitration process effective. . . . [W]hatever might be said about the merits of this argument, Congress has itself rejected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision." *Sinclair,* 370 U.S. at 213. Accordingly, given *Sinclair,* all that is properly left for decision is the question whether, although Congress determined that a strike injunction should not be grantable in a § 301 action in a federal court, it nevertheless concluded that the identical injunction should be grantable in an identical action in a state court. Congress did not legislate that idiosyncratic disparity.

1. The principle which governs in a § 301 action, whether brought in a state court or a federal court, is uniform application of paramount federal law. Uniformity is the desideratum of national labor policy and fits the ideal of the evenhanded rule of law. And there can be no uniformity if a strike injunction is unavailable in a federal court but obtainable in a state court in a § 301 action. The disparity is not limited to state courts and federal courts vis-a-vis each other. There is no uniformity from one state court to another. Strike injunctions are grantable in some state courts but not in others. The allowability of a strike injunction in a state court would therefore make for a crazy quilt hopelessly destructive of uniformity.

2. The uniformity which this Court's decisions have stressed as essential in § 301 actions is not limited to the substantive interpretation of the contents of the

collective bargaining agreement but extends to procedure and remedy as well. This Court requires the specific performance of an executory promise to arbitrate; it has established the rule that, while an individual employee has standing to maintain a § 301 action, he may not do so if he has not attempted to exhaust the grievance and arbitration procedure, and not even then unless the union has defaulted in its duty of fair representation; it holds that a § 301 action is maintainable despite the availability of an alternative remedy from the National Labor Relations Board; it *requires that* procedural arbitrability be determined by the arbitrator; and it has formulated the principle which governs the apportionment of damages when an employer has breached the collective bargaining agreement and the union has violated its duty of fair representation. Obviously, although these rules are clearly "procedural" or "remedial," a state court is not empowered to apply different rules in a § 301 action.

Accordingly, uniformity is essential with respect to all meaningful aspects of a § 301 action whether denominated "substantive," "procedural," or "remedial." Indeed, the procedure by which a right is realized and the remedy by which it is vindicated may well be more important than its substantive definition. And that is plainly true of a strike injunction in a labor dispute. The fact is, "noted by all competent students of industrial relations, that in labor disputes the injunction remedy is inextricably linked with the rights of the parties involved; a strike may be won or lost, depending upon whether the employer's application for a temporary injunction or a temporary restraining order succeeds or fails. . . . Thus, to deny employers the injunctive remedy in Section 301 cases brought in fed-

eral courts, while permitting them to obtain that remedy in similar actions brought in state courts, would be to cause a marked disparity between the substantive rights of litigants under a law which purports to establish a common rule for all."[2]

3. Nor will it do to contend that, as the Norris-LaGuardia Act is applicable to federal courts but not to state courts, its limitations are irrelevant to a § 301 action brought in a state court. The Norris-LaGuardia Act expresses national labor policy and its equitable restrictions have substantive import. And it expresses national policy even if its focus is thought to be entirely procedural. The preliminary issuance of a strike injunction determines the outcome of the strike without regard to an ultimate determination that the strike was or was not substantively rightly enjoined. The drastic effect of the so-called temporary remedy practically moots the substantive question of the right to the relief. And this of course was a principal evil against which the Norris-LaGuardia Act was aimed. It remains an evil to this day; it is an evil in a § 301 action no less than in any other labor dispute; and the national labor policy expressed in the Norris-LaGuardia Act which does not allow the evil to manifest itself in a federal court does not tolerate it in a state court in a § 301 action. When the crux of the action is the enforcement of a federal right, a state court is not empowered to do what a federal court is debarred from doing. A strike injunction is not grantable in a § 301 action in any court, state or federal, not because the Norris-LaGuardia Act applies to state courts,

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[2] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027, 1035-36 (1963).

but because that Act defines federal policy with respect to the enforcement of federal labor contracts.

4. Petitioner's pervasive theme is that Congress, in enacting § 301 to strengthen the enforcement of collective bargaining agreements, could not have meant to weaken existing remedial authority by disallowing the issuance of strike injunctions by state courts to enjoin strikes in breach of no-strike promises. But, as *Sinclair* holds, Congress rejected the argument that the availability of a strike injunction was necessary to the efficacious enforcement of a no-strike promise. Given *Sinclair,* and its conclusion that Congress repudiated the view that "injunctions against peaceful strikes are necessary to make the arbitration process effective" (370 U.S. at 213), there is no room for the identical argument just because the § 301 action is brought in a state court rather than a federal court.

Furthermore, were the issue still open, it is hardly datum that a strike injunction is important to secure performance of a no-strike promise. The overall incidence of strikes over grievances submissible to arbitration is doubtless quite small, so that in perspective we deal with a fairly minor matter. Furthermore, insofar as legal sanctions promote performance of a no-strike promise, the employer is free to discharge or discipline strikers and their leaders, and compensatory damages are recoverable—hardly inconsiderable deterrents to unauthorized strike action. In addition, as most strikes in breach of a no-strike promise are wildcat in character and therefore unauthorized by the union, and which the union is already doing its best to stop, a strike injunction directed to the union adds nothing to its efforts to bring the strike to an end, and a strike

injunction directed to the men requiring them to return to work against their will is of doubtful constitutional validity and of uncertain practical use. To the probable needlessness and inefficacy of a strike injunction as a sanction there must also be added the known abuse to which the strike injunction has been and will be put however abstractly just the cause in which it is enlisted.

Perhaps more fundamental than these considerations, however, is the fact that the system of agreed submission of grievances to arbitration and the concomitant adherence to a no-strike promise is not dependent on the availability of legal sanctions to make it work and is not repairable by legal sanctions if it does not work. Despite the legal underpinnings provided by § 301, adjustment of contract claims through the grievance and arbitration procedure without strikes is essentially an autonomous system of self-government which draws its sustenance from the self-determined commitment of the parties to it. Viewed in this light the availability of a strike injunction is almost an irrelevancy.

All this suggests that the problem, if one exists, and a solution, if one is desired, is for Congress. This is especially so in view of the fact that, in the five and one-half years since *Sinclair,* Congress has not been persuaded to change the *Sinclair* rule, and has not acted on bills designed to modify it. Judges should be slow to respond to a controversial claim of what the common-weal supposedly requires when the legislators are content to leave well enough alone. Congress sits as well as this Court.

ARGUMENT

An action brought in a state court is removable to a federal district court when it is within the "original jurisdiction" of the federal court and is founded on a claim or right "arising under" a law of the United States. We shall show that a § 301 action meets each of these two prerequisites, and nonetheless so because the sole relief requested by the plaintiff is a strike injunction, and that therefore removal is mandatory on the defendant's petition. We shall further show that the unavailability of a strike injunction in a federal court in a § 301 action when the suit is removed, and the supposed availability of a strike injunction in a state court in a § 301 action if the suit is not removed, are each irrelevant to removal. This case, accordingly, presents no question as to whether a state court is empowered to issue a strike injunction in a § 301 action. We shall finally show that, if that question is reached, the answer is clear that a state court, like a federal court, is precluded as a matter of federal law from issuing a strike injunction in a § 301 action.

I. THE ACTION IS REMOVABLE FROM THE STATE COURT TO THE FEDERAL DISTRICT COURT

A. The Action Is "Founded on a Claim or Right Arising Under the Constitution, Treaties or Laws of the United States. . . ."

One prerequisite of nondiversity or federal question removal is that the action be "founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ." 28 U.S.C. § 1441(b). That prerequisite is incontestably satisfied in this case. This action is based on, and can only be based on,

section 301(a) of the Labor Management Relations Act, 1947. As a suit for violation of a contract "between an employer and a labor organization representing employees in an industry affecting commerce . . .," section 301(a) is the sole source of right that petitioner can invoke to support its claim. Federal law is the exclusive determinant of the validity, interpretation, and enforcement of the contract which petitioner alleges has been violated.

This is settled law. The "substantive law to apply in suits under § 301 (a) is federal law which courts must fashion from the policy of our national labor laws . . . . Federal interpretation of the federal law will govern, not state law . . . : But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456-457.

While suit to enforce the federal right may be brought in a state court (*Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502), the state court must apply federal law in the determination of the controversy (*Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95). "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount" (*id.* at 103); "issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy" (*ibid.*); "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law' " (*ibid.*); "The importance of the area which would be affected by separate systems

of substantive law makes the need for a single body of federal law particularly compelling" (*id.* at 104); and so, "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules" (*ibid.*). Accordingly, an "action . . . arising under § 301 . . . is a case controlled by federal law, . . . even though brought in the state court." *Humphrey* v. *Moore,* 375 U.S. 335, 344-345. In short, whether the action is begun in a state or federal court, "§ 301 has substantive content and . . . Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." *Smith* v. *Evening News Association,* 371 U.S. 195, 199. See also, *Local Union No. 721, Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247, 250.

Accordingly, *assuming* a state court could grant a strike injunction in a § 301 action—an erroneous proposition which is at the forefront of petitioner's argument but which is not analytically even present as a question in this case (*infra,* pp. 44-45)—it would be only because *federal* law authorizes the grant of this remedy by a state court. Thus, state limitations statutes apply in determining whether a § 301 action is time-barred, but solely because this is the federal rule which has been fashioned in answering the federal question of timeliness. *International Union, Automobile Workers* v. *Hoosier Cardinal Corp.,* 383 U.S. 696. The "timeliness of a § 301 suit . . . is to be determined, *as a matter of federal law,* by reference to the appropriate state statute of limitations" (*id.* at 704-705, emphasis supplied). So here, were it true that a state court would be empowered to issue a strike injunction in a § 301 action, it could do so only because it was allowable

as a matter of federal law. *Cf.; United States* v. *Yazell,* 382 U.S. 341, 356-357, and n. 34.[3] Federal law exclusively controls. There is no residue of independent state law operating free of federal governance. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 548.

There is, therefore, no room for petitioner's view that "a suit filed in a state equity court seeking injunctive relief should be held to arise under the laws of that State and not under the laws of the United States" (Pet. br. p. 36). The "Labor Management Relations Act § 301 contract . . . is a federal contract and is therefore governed and enforceable by federal law. . . . " *International Association of Machinists* v. *Central Airlines,* 372 U.S. 682, 692. In an action on such a contract "we are not dealing with a suit involving an aspect of federal law which is only collateral or remote or a case where state and federal laws are so blended as to present a serious question of the scope" of federal question jurisdiction. *Id.* at 695-696. On the contrary, federal law enters the case with the petitioner and is the only law which it can invoke to support its claim of a contract violation. "That an action arises under federal law if the plaintiff asserts a federally-created cause of action seems plain." Hart and Wechsler, The Federal Courts And the Federal System, 763 (1953). It is therefore crystal clear that the action in this case is "founded on a claim or right arising under the . . . laws of the United States . . . ." 28 U.S.C. § 1441(b).

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[3] See also, Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 529-530 (1954).

B. The Action Is One "Of Which the District Courts Have Original Jurisdiction. . . ."

The companion prerequisite for removal is that the action be one "of which the district courts have original jurisdiction . . . ." 28 U.S.C. § 1441(b). The crux of petitioner's argument is that a federal district court is without "original jurisdiction" over an action for breach of a collective bargaining agreement because it is without authority by reason of the Norris-LaGuardia Act to issue a strike injunction as one remedy available to the court should it find a contract violation. The argument confuses subject matter jurisdiction (the power to entertain a claim of contract violation) with equity jurisdiction (the authority to grant a particular form of relief to redress a well-founded claim). ". . . [W]hen ordinarily speaking of the 'equity jurisdiction' we do not thereby refer to the general power inherent in a court to decide the controversy at all,—a power so essential that its absence renders the decision a mere nullity, but we intend by that phrase to describe some more special and limited judicial authority." 1 Pomeroy's Equity Jurisprudence 176 (5th ed., Symons, 1941).

This distinction between subject matter jurisdiction and equity jurisdiction is central to this case. By § 301 Congress invested federal district courts with subject matter jurisdiction over labor contract violation suits; it did so in the exercise of its power under the Commerce Clause (*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457); related to the terms of the general federal question jurisdiction conferred by 28 U.S.C. § 1337, the federal district courts have "original jurisdiction" because a § 301 suit is a civil action or proceeding arising under an "Act of Congress regulating

commerce . . ."; and the "original jurisdiction" defined by 28 U.S.C. § 1337 is identical with the "original jurisdiction" required for removal by 28 U.S.C. § 1441(b).[4] In exercising its original jurisdiction, a strike injunction is not within the arsenal of remedies available to a federal district court in a suit over a labor contract violation claim, but that constitutes a limitation upon the court's equity jurisdiction, not referable to subject matter jurisdiction and therefore not relevant to removal. *Venner* v. *Great Northern Ry. Co.*, 209 U.S. 24, 33-35.

1. The preclusion of a strike injunction as an equitable remedy is a limitation of equity jurisdiction and not a divestiture of subject matter jurisdiction

We begin with the obvious. A federal district court is empowered to decide an action in which the claim made is the violation of a labor contract. The threshold determination required of the court is whether a contract exists and has been breached. No question of the relief available is presented until it is first found that a wrong has been committed. Once determined that a violation has occurred a whole host of remedies is available to the court to redress the breach. Dependent upon the relief appropriate to right the wrong, the court may compel specific performance of a promise to arbitrate (*Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448), enforce or set

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[4] ". . . [I]n general, removal is keyed to original jurisdiction." 1 Moore's Federal Practice, 662 (2d ed. 1964). "The present pattern of removal jurisdiction was fixed by the Judiciary Act of 1887. . . . For the first time the requirements of removal jurisdiction, under the general removal provision, were expressly tied together with those for original jurisdiction." Hart & Wechsler, The Federal Courts and the Federal System, 1019-20 (1953).

aside an arbitration award (*United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593), grant compensatory damages (*Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238), render a declaratory judgment,[5] or decree other proper redress. Any such action begun in a state court is removable to the federal district court, whether the relief ultimately grantable is specific performance,[6] confirmation or vacation of an award,[7] or money damages.[8]

The existence of subject matter jurisdiction to decide labor contract violation disputes is therefore clear. Thus the whole of petitioner's argument strips down to the assertion that, while a federal district court is empowered to decide the merits of an underlying claim that a contract breach has occurred upon which the grant of any relief is dependent, subject matter jurisdiction disappears if the sole relief that the claimant seeks is a strike injunction which the court is not authorized to grant. This formulation makes federal question jurisdiction turn, not upon the power of the court to decide the claim which is the foundation

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[5] *El Paso Bldg. Trades Council* v. *El Paso Chapter*, 376 F. 2d 797, 799-800 (C.A. 5); *Allied Oil Workers Union* v. *Ethyl Corp.*, 341 F. 2d 47, 49 (C.A. 5); *Black-Clawson Co.* v. *I.A.M.*, 313 F. 2d 179, 181-182 (C.A. 2).

[6] *Johnson* v. *England*, 356 F. 2d 44, 46-48 (C.A. 9); *Fitchburg Paper Co.* v. *MacDonald*, 242 F. Supp. 502 (Mass.).

[7] *Kracoff* v. *Retail Clerks, Local Union No. 1357*, 244 F. Supp. 38 (E.D. Pa.); *Central Metal Products* v. *International Union, U.A.W., Local 1249*, 195 F. Supp. 70 (E.D. Ark.); *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870 (S.D. N.Y.); *Ingraham Co.* v. *Local 260, I.U.E.*, 171 F. Supp. 103 (D. Conn.).

[8] *Patriot-News Co.* v. *Harrisburg Printing Pressmen*, 191 F. Supp. 568 (M.D. Pa.); *Fay* v. *American Cystoscope Makers*, 98 F. Supp. 278 (S.D. N.Y.); *Chapman* v. *Southeast Region I.L.G.W.U. Health & Welfare Recreation Fund*, 265 F. Supp. 675 (D.S.C.).

for any relief, but upon the particular form of relief that the suitor chooses to seek. This cart-before-the-horse approach is meritless.

"'The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action.'" *Venner* v. *Great Northern Ry. Co.*, 209 U.S. 24, 35. A statutory limitation upon "remedy . . . goes to the merits of the matter, and not . . . to the question of jurisdiction." *Sperry Gyroscope Co.* v. *Arma Engineering Co.*, 271 U.S. 232, 235. "Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U.S. 64, 69. "The Federal court may therefore be obliged to deny an equitable remedy which the plaintiff might have secured in a state court. . . . The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a Federal court." *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 498, 500. "By jurisdiction we mean power to entertain a suit, consider the merits and render a binding decision thereon; *and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought.*" *General Investment Co.* v. *New York Central Railroad Co.*, 271 U.S. 228, 230 (emphasis supplied).

And so, in this case, the preclusion of a strike injunction goes merely to the "right to the relief sought";

it is a determination of absence of merit as a matter of equity jurisdiction; it is not referable to subject matter jurisdiction. The petitioner turns the analysis upside down when it looks to the right to the particular relief sought rather than to the power to decide the underlying claim upon which the right to any relief is dependent as the determinant of subject matter jurisdiction. This essential distinction between the power to decide the underlying claim and the appropriate relief grantable if the claim is after adjudication determined to be well-founded is explicit in the Federal Rules of Civil Procedure. Rule 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." "While . . . every pleading setting forth a claim for relief should contain a demand for judgment, this prayer for relief constitutes no part of the pleader's cause of action; . . . the prayer does not limit the relief, legal and/or equitable, which the court may grant." 6 Moore's Federal Practice 1202-04 (2d ed. 1966); and see, *id.* at 1207-11. A "party praying for coercive relief may be entitled to relief by declaratory judgment, or other appropriate relief." *Id.*, 1966 Cum. Supp. 67.

The order of the District Court in this case was fashioned with exact and meticulous regard for this essential distinction between subject matter and equity jurisdiction. Upon denial of petitioner's motion to remand, and acting on respondent's motion "to dissolve the temporary injunction . . . and to dismiss the case" (R. 13), the court ruled that "the motion to dissolve the injunction is well taken and that the motion to dismiss the action is not well taken" (R. 22).

It therefore ordered that "the motion to dismiss the action is denied, and . . . that the injunction heretofore issued . . . is . . . dissolved" (R. 22).

To be sure, if a party chooses to restrict himself to the one form of relief not within the court's authority to grant, and refuses to proceed to secure grantable relief if his claim is well-founded, it would be pointless for the court to exercise its power to adjudicate the controversy. Courts do not sit to force unwanted relief upon a party.[9] But the consequence of the party's obduracy is that he has deprived himself of relief. He has not deprived the court of its jurisdiction. A party may be the master of his pleading. He is not the master of the court's jurisdiction.

Any other view simply invites action-splitting procedural jugglery. For example, in *American Dredging Co.* v. *Local 25, Marine Division,* 338 F. 2d 837 (C.A. 3), reversing, 224 F. Supp. 985 (E.D. Pa.), cert. denied, 380 U.S. 935, the Court of Appeals for the Third Circuit was apparently of the view that an action brought in a state court would be removable if the complaint sought both an injunction and damages (338 F. 2d at 839, n. 8, 9th and 10th paragraphs),[10] and it was therefore at pains to point out that the complaint before it sought injunctive relief only and for that reason was not removable (*id.* at 848-849). But the fact is, as the Court of Appeals felt "compelled to note", that "there were pending at the time of the denial of remand two

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[9] *International Nikoh Corp.* v. *H.K. Porter Co.,* 358 F. 2d 284, 290 (C.A. 7); 6 Moore's Federal Practice 1208 (2d ed. 1966).

[10] *Byrnes Express & Trucking Co.* v. *Drivers Local Union 816,* 56 CCH Lab. Cas. ¶ 12,307, p. 20,335 (E.D.N.Y., Nov. 27, 1967).

separate actions for damages brought by the plaintiff against the defendants here" (*id.* at 849). Both were filed in the District Court on November 4, 1963 (*id.* at 849, n. 26), the same day that defendants removed the state action for injunctive relief which had been filed on November 1 (224 F. Supp. at 987). Accordingly, there was pending in the federal district court the removed injunction action and the two original damage actions all arising from the same operative events. To support remand of the injunction action, notwithstanding its plain purpose to seek both money damages and an injunction, the plaintiff amended its complaint to add the following paragraph to the prayer for relief (*id.* at 988):

> Plaintiff, by this Complaint, solely seeks injunctive relief and Plaintiff expressly foregoes and releases *in this suit and for the purpose of this suit alone,* any claim or demand for damages or money judgment, which this Court may order under its power and authority incidental to its equitable jurisdiction. [Emphasis supplied.]

But this was game-playing. Plaintiff had a single claim for which it sought both injunctive relief and money damages. It bifurcated its claim, invoking the power of the federal district court to decide the claim for the purpose of securing money damages, and separately invoking the supposed power of the state court to decide the same claim for the purpose of securing injunctive relief. But there was at all times only one claim, and that was for contract violation. A single claim is not multipliable by the number of different forms of relief available to redress the one wrong. *American Fire & Casualty Co.* v. *Finn,* 341

U.S. 6; *cf., U.M.W.* v. *Gibbs,* 383 U.S. 715, 721-725.[11] The federal district court thus had power to decide the claim of contract violation. That was the very power that plaintiff invoked when it sought money damages based on that claim. The federal district court therefore had subject matter jurisdiction, and nonetheless so because a strike injunction was not part of its arsenal of remedies. Questions of jurisdiction and removal should not be decided by or depend on the sleight of hand of dividing a single action into two segments, bringing one part into a federal court to secure money damages and another part into a state court to secure a strike injunction. A party cannot "restrict the court's jurisdiction arising out of the same set of facts by merely choosing to request a form of relief which is not available." *Oman Construction Co.* v. *Teamsters Local 327,* 263 F. Supp. 181 (M.D. Tenn.).

In short, as the District Court correctly observed in *American Dredging,* the argument that the federal court lacks jurisdiction fails to distinguish between subject matter jurisdiction and equity jurisdiction; the federal court "does have jurisdiction of this action for violation of the collective bargaining agreement between the parties"; and this "jurisdiction cannot be divested by the artifice of the plaintiff in limiting its claim to the single form of relief which § 4 of the Norris-LaGuardia Act presently precludes." 224 F. Supp. at 988-989. "The jurisdiction" of a federal

[11] See also, *Wittstein* v. *American Federation of Musicians,* 56 CCH Lab. Cas. ¶ 12,295, p. 20,295 (S.D.N.Y., Nov. 28, 1967), and cases cited. As expressed by the District Court, "a single wrong gives rise only to a single cause of action regardless of the fact that the complaint is fractured into multiple counts" (R. 20, n. 3).

court "does not depend on the ingenuity of the form of a complaint in equity." *Food Fair Stores* v. *Retail Clerks District Council,* 229 F. Supp. 123, 127 (E.D. Pa.).

2. The Norris-LaGuardia Act fits the distinction between subject matter and equity jurisdiction to perfection

The argument that a federal district court is without "original jurisdiction," thus precluding removal, rests of course upon the proposition that the limitations imposed by the Norris-LaGuardia Act in terms of "jurisdiction" divest the court of power over the subject matter. But the argument is simplistic in its disregard of the traditional distinction between subject matter jurisdiction and equity jurisdiction which the Norris-LaGuardia Act fits to perfection. An analysis of the terms, content and structure of the Norris-LaGuardia Act shows clearly that its restrictions pertain, not to the power of the court to entertain the controversy, but to the manner in which its power shall be exercised. "Although each of the Act's inhibitions is framed as a denial of 'jurisdiction' to issue an injunctive order of the forbidden sort or in the forbidden circumstances, each inhibition necessarily assumes the existence of a 'case' of which the court has jurisdiction and which it must, and has power to, adjudicate in accordance with the standards the Act imposes." *Crestwood Dairy* v. *Kelley,* 222 F. Supp. 614, 615 (E.D.N.Y.). The Norris-LaGuardia Act is operative therefore, not as a denial of subject matter jurisdiction, but "as a restriction on exercises of the federal equity jurisdiction. . . ." *Id.* at 617. Accord, *Publishers' Association* v. *Printing Pressmen's Union,* 246 F. Supp. 293, 295, 296 (S.D.N.Y.).

The title of the Norris-LaGuardia Act is instructive.[12] It is an act "To amend the Judicial Code and to define and limit the jurisdiction of courts *sitting in equity, and for other purposes*" (emphasis supplied). The definition and limitation of jurisdiction is thus in terms related to "courts *sitting in equity,*" a classic referent to equity jurisdiction, and the extension of the Act to "other purposes" refers to the substantive as well as procedural reforms that the Act accomplishes. The succeeding enacting clause confirms the title. Power to issue injunctions exists, so long as the grant is in "strict conformity with the provisions of this act" and not "contrary to the public policy declared in this act."

The public policy which section 2 of the Norris-LaGuardia Act declares, and which is the avowed underpinning for its interpretation and the determination of the scope of its limitations, is substantive labor policy framed in terms virtually identical with those later incorporated in the National Labor Relations Act. The definition of a labor dispute in section 13(c) of the Norris-LaGuardia Act, extending its bounds beyond disputants standing "in the proximate relation of employer and employee", mirrors the public policy declared in section 2 (*United States* v. *Hutcheson,* 312 U.S. 219, 231), and is integral as well to the National Labor Relations Act (*Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 192). Apart from its declaration of labor policy, the Norris-LaGuardia Act is frankly substantive in its outlawry of the yellow dog contract (§ 3), and in its prescription of standards for imposing

[12] The full text of the Norris-LaGuardia Act is set out in the Appendix, *infra,* pp. 73-80.

vicarious responsibility (§ 6; *U.M.W.* v. *Gibbs,* 383 U.S. 715, 735-737).[13]

Furthermore, the safeguards with which the Norris-LaGuardia Act surrounds the grant of injunctive relief entwine purely procedural reform, traditional equity practice, and substantive considerations of sound labor policy (§§ 7-9). Thus, on the purely procedural side, an adequate bond is required (§ 7) and findings of fact must be made (§9); on the traditional equity side, "substantial and irreparable injury" must be shown (§ 7(b)), as well as the absence of an "adequate remedy at law" (§ 7(d)); and on the substantive side, a precondition to injunctive relief is the exhaustion of "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration" (§ 8), a requirement designed to encourage recourse to "negotiation, mediation, and arbitration for the adjustment of labor disputes" (*Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad,* 321 U.S. 50, 58-59). An expedited appeal is provided in the event an injunction is issued or denied (§ 10); a jury trial is afforded to adjudicate charges of civil or criminal contempt[14] (§ 11, now 18 U.S.C.

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[13] Section 301(e) of the Labor Management Relations Act displaces section 6 of the Norris-LaGuardia Act in § 301 actions. *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 204, and n. 17, 207-208.

[14] Section 11 of the Senate bill which became the Norris-LaGuardia Act provided for a jury trial in all cases of contempt, civil or criminal, without limitation to labor disputes. 75 Cong. Rec. 4761. The House bill was limited to criminal contempts arising out of labor disputes within the purview of the Norris-LaGuardia Act. 75 Cong. Rec. 5509. In conference the difference was resolved by providing that section 11 would cover both civil and criminal contempt but would be limited to cases arising under the Norris-LaGuardia Act. 75 Cong. Rec. 6450, 6453, 6337.

§ 3692); and provision is made for recusing the judge (§ 12).

Section 4 of the Norris-LaGuardia Act defines certain acts which the court shall not enjoin, notably "ceasing or refusing to perform any work or to remain in any relation of employment" (§ 4(a)). But the description of nonenjoinable conduct is carefully qualified. Aiding any plaintiff or defendant in a labor-affected state or federal judicial proceeding is not enjoinable if the assistance is rendered by "lawful means" (§ 4(d)). Publicizing a labor dispute is not enjoinable if the method employed is one "not involving fraud or violence" (§ 4(e)). Assembling is not enjoinable if it is conducted "peaceably" (§ 4(f)). And inducing the performance of nonenjoinable acts is itself nonenjoinable if the importunity is "without fraud or violence" (§ 4(h)).

The entirety of the Norris-LaGuardian Act therefore bespeaks, not divestiture of power to entertain the controversy, but circumscription of the manner that the power shall be exercised. The plaintiff is turned out, not because the subject matter of the controversy is not within the court's competence, but because the plaintiff has failed to satisfy the prerequisites to the grant of relief. As this Court has said, the Norris-LaGuardia Act "did not entirely abolish judicial power to impose previous restraints in labor controversies. But its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy. It sought to make injunction a last line of defense. . . . " *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50, 58-59. The unavailability of injunctive relief does not mean that a plaintiff "is left without

remedy. Other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, . . . [and other relief may be available in the federal court. The plaintiff's failure to satisfy the prerequisites for injunctive relief prescribed by the Norris-LaGuardia Act has therefore] not left it without legal protection. That failure has deprived it merely of one form of remedy which the Congress, exercising its plenary control over the jurisdiction of the federal courts, has seen fit to withhold." *Id.* at 63-64.

In short, in speaking of jurisdiction, every line of the Norris-LaGuardia Act, with complete fidelity to its terms, purpose, and history, is fully and naturally explicable as a restriction on the court's equity jurisdiction, with no need to reach subject matter jurisdiction.[15] Limitation of the exercise of equity jurisdiction is the legislative refrain. The bill which became the Norris-LaGuardia Act "does not undertake to withdraw from the Federal judiciary any of its functions in equity, but it merely imposes conditions upon them and restraints upon them with reference to the issuance of injunctions in labor disputes" (75 Cong. Rec. 5465, Congressman Bankhead); "I dislike very much to find it necessary to curb the ancient and honorable power of our equity courts. Yet we must realize

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[15] The distinction is indeed expressed in the three questions presented in *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria & Western Railroad*, 321 U.S. 50, 54-55, only the last of which this Court decided (*id.* at 55). The first question went to the court's power to entertain the controversy, "since there is no claim of diversity of citizenship and, it is said, no federal question is involved" (*id.* at 54). The second and third questions went to satisfaction of prerequisites to injunctive relief prescribed by the Norris-LaGuardia Act (*id.* at 54-55), and therefore pertained merely to the court's exercise of equity jurisdiction.

that it is sometimes essential to provide against the human frailties of possible well-meaning judges, and let us not forget that we are dealing entirely with the jurisdiction in equity, and are not imposing any limitation on the law side of the court" (75 Cong. Rec. 5464, Congressman Michener); "This bill simply corrects the abuses of the administration of the equity powers of the Federal courts" (75 Cong. Rec. 5493, Congressman Garber); "There is no effort . . . in any wise to affect—far less to reduce or destroy, the just jurisdiction of the courts in full exercise of the equity power which is vested in the Federal Courts by the Constitution of the United States. The effort here is to guide the exercise of the power . . . " (75 Cong. Rec. 4754, Senator Lewis); and so, "Congress having the power to establish, and confer jurisdiction upon, the courts in question, it cannot be questioned that it has the power to restrict or curtail the exercise of their powers, as proposed in this bill" (H. Rep. No. 669, 72d Cong., 1st Sess., 3). As explained in the memorandum attached to the House Report, authored by then Professor Felix Frankfurter, by the enactment of the Norris-LaGuardia Act Congress would be exercising its power "over *equity jurisdiction* of the federal courts." *Id.* at 12, and *passim* 12-16 (emphasis supplied).

Thus, Congress did not withdraw subject matter jurisdiction but limited the exercise of equity jurisdiction. As this Court has stated, speaking through Mr. Justice Frankfurter, when the Norris-LaGuardia Act is interposed as an objection to the grant of injunctive relief in a federal district court, "the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its *equity jurisdiction.*" *Bakery Sales Drivers*

Union v. *Wagshal,* 333 U.S. 437, 439 (emphasis supplied).

3. Other statutes, at least as peremptory as the Norris-LaGuardia Act, have been related to equity jurisdiction

To relate the Norris-LaGuardia Act to equity jurisdiction is faithful to this Court's treatment of other statutes in which the limiting command addressed to the federal court is at least as peremptory as the Norris-LaGuardia Act. Thus, in construing the requirement that the "writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state . . . " (28 U.S.C. § 379 (1928), now 28 U.S.C. § 2283 (1948)), this Court held that it "is not a jurisdictional statute . . . . It merely limits their [the federal district courts'] general equity powers in respect to the grant of a particular form of equitable relief; that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill." *Smith* v. *Apple,* 264 U.S. 274, 278-279.

Similarly, while "Section 267 of the Judicial Code, U.S.C.A. title 28, § 384, forbids the maintenance of suits in equity in the courts of the United States 'in any case where a plain, adequate and complete remedy may be had at law' ", this bar "is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." *DiGiovanni* v. *Camden Fire Ins. Co.,* 296 U.S. 64, 69. The "issue is not one of jurisdiction but of the need and propriety of equitable relief. . . . " *Atlas Insurance Co.* v. *W. I. Southern, Inc.,* 306 U.S. 563, 570.

it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, '. . . if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.' The Fair v. Kohler Die & S. Co., 228 U.S. 22, 25. Even a patently frivolous complaint might be sufficient to confer power to make a final decision that it is of that nature, binding as res judicata on the parties."

Fourth, in light of the points just noted, *Atkinson* also indicates that the federal district courts have original jurisdiction over a complaint based on the claim that a union has breached a no-strike clause in which only an injunction is sought. That the relief explicitly sought in such a complaint must be denied is traceable to the fact that the court does not have equitable jurisdiction to afford the plaintiff that remedy. The lack of equitable jurisdiction, however, does not mean that the court in question lacks original jurisdiction over the suit. As this court stated in *DiGiovanni v. Camden Fire Insurance Association*, 296 U.S. 64, 69 (1935):

"Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." *See also, e.g., Venner* v. *Great Northern Ry. Co.*, 209 U.S. 24, 35 (1908); *Pusey & Jones v. Hanssen*, 261 U.S. 491, 498, 500 (1923).

The Federal Rules of Civil Procedure are premised on the basic concept enunciated in *DiGiovanni*. Rule 2 states that "there shall be one form of action to be known as 'civil action' " and Rule 54(c) states ". . . every final judgment shall grant the relief to which the party in whose favor it is entitled even if the party has not demanded such relief in his pleading." Both of these rules are based on the gen-

eral proposition that it is the basic claim that controls for purposes of subject-matter jurisdiction and not distinctions based on the common law forms of action, the historical division of law and equity, or ingenious attempts to split a single claim into a number of causes of action. And, of course, it is the federal conception of the nature of a claim, the proper dimension of a lawsuit, and equitable and subject-matter jurisdiction, and not the vagaries of state law that control in determining when removal is proper. For in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 104 (1940), the Court noted:

> "[A]t the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. Dodge R. Co. v. Boynton, 204, U.S. 570, 27 S. Ct. 321. The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

Fifth, our argument thus far is based on the proposition that the result reached in *Sinclair* does not deprive the federal district courts of original jurisdiction, that it goes only to equitable jurisdiction, and that the latter is a far different and far more limited concept than the former. This argument faithfully reflects the Congressional intention embodied in Norris-LaGuardia. There is no indication that in using jurisdictional language in that statute Congress wished to withdraw subject-matter jurisdiction; indeed, the title of the statute refers to the jurisdiction of courts "sitting in equity" a common method of refering to the principles of equitable jurisdiction. As Congressman

Bankhead stated "[We do] not undertake to withdraw from the Federal judiciary any of its functions in equity but merely [to] impose conditions upon them and restraints upon them with reference to the issuance of injunctions in labor disputes." 75 Cong. Rec. 5465. And the overall focus of Norris-LaGuardia is plainly not on original jurisdiction for, as *Atkinson* demonstrates, it does not affect damage suits and it combines provisions dealing with substantive policy, for example Section 6, *see Mine Workers* v. *Gibbs*, 383 U.S. 715, 735-737 (1965), and provisions providing for procedural reforms concerning traditional equity practice, *see* Sections 7-9. Thus, as Professor Chafee concluded after considering this problem thoroughly, the term "jurisdiction" in Norris-LaGuardia refers to equitable jurisdiction, i.e. to "right principles of judicial action and not to power." Chaffee, Some Problems of Equity 372 (1950); *compare e.g. Smith v. Apple*, 264 U.S. 274, 278-279 (1924); *McCormick* v. *Sullivant*, 10 Wheat 192 (1825).

Sixth, our argument here is completely consistent with the overall purpose of the removal statute. In *Zwickler* v. *Koota*, —— U.S. ——, 36 U.S. Law Week 4041, 4042-4043 (December 5, 1967), this Court explained the function of the United States' District Courts' original jurisdiction over federal question litigation in the following terms:

> "During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. The only exception was the 25th section of the Judiciary Act of 1789 providing for review in this Court when a claim of federal right was denied by a state court. But that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers. The Act of March 3, 1875 was the principal '. . . measure of the broadening federal domain in the area of individual rights,' McNeese v. Board of Education, 373 U.S. 668,

> 673. By that statute . . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restrictive tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."

The jurisdictional language of the removal statute is identical to that of 28 U.S.C. §§ 1331 and 1337, the Sections governing federal question litigation. These Sections in turn stem from the same Constitutional base, Art. III, Sec. 2, cl. 1, as does Section 301. And it is well settled that the removal statute is to be construed as referring to "the same class of cases covered" by the general federal question jurisdiction 1 Barron & Holtzoff, *supra,* § 102 p. 468. In light of the interrelation of these provisions, the overall Congressional purpose they evince is clearly to insure that no federal question case is tried in a state court *unless both parties wish to have it tried there.* The removal statute provides the insurance necessary to vindicate the primary position of the federal courts in federal question litigation.

2. The primary thrust of the Petitioner's argument here is not directed toward an elucidation of the jurisdictional principles which control the question upon which this case actually turns. Instead the Petitioner attempts to overcome these principles by main force and to turn this case into one in which the decisive considerations are matters of labor policy. It argues that Congress viewed the state court injunction as one of the primary remedial devices to insure the enforceability of no-strike provisions and that for this reason, given *Sinclair,* removal should be denied (Pet. Br. 8-32). There are two insurmountable objections to this argument.

The first is that there is simply no evidence that Congress viewed the injunction as a favored method for enforcing

would be at the instance of private parties rather than at the instance of the Labor Board, no change in the existing anti-injunction provisions of the Norris-LaGuardia Act should be made. The House Conference Report expressly recognized that the House provision for repeal in contract actions of the anti-injunction prohibitions of the Norris-LaGuardia Act had been eliminated in Conference.

The Court's ultimate conclusion from that history and from the language of Section 301 was that (370 U.S. at 213-214):

> "Obedience to the congressional commands of the Norris-LaGuardia Act does not directly affect the 'congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes' at all for it does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement. At the most, what is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement."

Thus the Employers' policy argument on removal comes down to this: it is plain from *Lincoln Mills* that Congress wished to subject the enforcement of collective bargaining agreements to a federal regime; it is also plain from *Sinclair* that Congress incorporated as part and parcel of the governing federal law the restraints on injunctive relief provided by Norris-LaGuardia; nevertheless Congress should be deemed to have considered injunctive relief against strikes allegedly in breach of contract so central to labor policy that the normal jurisdictional principles which govern removal should be ignored, or in the alternative overriden, in order to facilitate efforts to obtain such injunctions. With all due respect we submit that to state the argument is to refute it.

Second, the Petitioner's arguments (Pet. Br. 33-49) which deal with the jurisdictional principles which are germane here are no stronger than those it employed in the attempt to suggest that those principles should be overriden because of its conception of labor policy. The argument that a suit based on a claim that there has been a breach-of-contract-strike does not arise under federal law is squarely contrary to *Lincoln Mills* and *Atkinson*. And the argument that such a suit is not within the original jurisdiction of the federal district courts is the result of a failure to observe the well settled distinction between subject matter jurisdiction, which is a concept going to the nature of the basic claim, and equitable jurisdiction, which is a concept going to the merits, *see* pp. 4-8 *supra*.

Indeed it is fair to say that the Petitioner's position, insofar as it is not limited to a reliance on labor policy, must be deemed to rest on the proposition that removal should be denied if the defendant seeks and gains an advantage by removing a case that the plaintiff wished to deny him by filing the suit in state court. Under this theory removal would likewise have to be denied in all non-labor cases brought in state courts in which the limitations on the issuance of injunctions are less severe than those set forth in Rule 65 of the Federal Rules. Removal would also have to be denied if the defendant wished to take advantage of the generally more liberal processes of discovery available in the federal courts. Examples could be multiplied indefinitely for we take it as a datum that removal is normally sought in order to gain a legal advantage. Thus, insofar as the Petitioner here relies on a general principle, it is one that goes far toward gutting the removal jurisdiction.

3. The instant case is important in itself. In addition, however, it has ramifications which can only be appreciated by placing it in historical perspective. For the history of labor relations in this country teaches that the labor in-

junction became a symbol of industrial oppression because its growth was the product of the opportunistic manipulation and distortion of general equity principles. This point is emphasized again and again in Frankfurter and Green, The Labor Injunction (1930), the classic study in the field. As a basis for the conclusions they reached, Frankfurter and Green considered the workings of the central mechanism of labor injunction practice—the Bill of Complaint, the use of Affidavits, and the scope of the restraining clauses in the Injunctions which were issued. As to each, the evidence they assembled demonstrates how equity practice was deformed in the service of what were believed to be overriding policy considerations.

Thus as to the Bill of Complaint, Frankfurter and Green note (*Id.* at 63-64):

> "We shall not weary the reader with samples of complaints used in New York and Massachusetts. Always and everywhere the badges of illegality are the same. They are transcribed almost verbatim from case to case. The allegations in a bill of equity which have proved sufficient to evoke injunction are as perfunctorily dictated as the statement of a cause of action for money had and received. Seldom, however, is judicial protest voiced against such practice."

In reviewing the use of Affidavits they state (*Id.* at 68, 71):

> "The most serious complaint that can be made against injunctions, which have become so prominent a part of the law in dealing with strikes in the United States,' according to Judge Amidon, 'is the fact that courts have become accustomed to deciding the most important questions of fact, often involving the citizen's liberty, upon this wholly untrustworthy class of proof.

* * *

> "*Arnheim* v. *Hillman* was an injunction proceeding against the Amalgamated Clothing Workers of America . . . The array of affidavits mustered by both sides

was unusually imposing; fifty-two for the complainant and fifty-four for the defendants. Each sworn allegation and every specified incident of disorder were controverted by detailed denial, sworn to with equal solemnity. A preliminary injunction *pendente lite* was denied at *nisi prius;* on appeal an injunction was ordered."

Finally as to the nature of the restraining clauses included in such Injunctions they report (*Id.* at 87-88):

"The federal courts have given the labor injunction its farthest reach of application. In the *Debs Case,* the famous 'omnibus' injunction was issued against the defendants, 'and all persons combining and conspiring with them and all other persons whomsoever.' An even earlier decree ran against 'all persons generally.' When the phrasing of the Debs injunction was still warm, Mr. Dunbar, a conservative leader of the Bar, protested against it: 'If the course there followed can be supported, the principles of equity jurisprudence have received an important extension which may render "government by injunction" more than a mere epithet.' Later decrees have followed and extended the early models, bringing within the area of potential contempt the conduct of all undefined persons who in the future might threaten or encourage or commit violation of the ambiguous schedule of forbidden acts.

* * *

"Injunctions have issued against strikes and against the payment of strike benefits. Union officials have been restrained from calling or instigating strikes, from rendering assistance to strikers or workmen about to go on strike, and have been commanded to call off an effective strike. Strikers have been enjoined from all persuasion, from peaceful patrolling, from attempts to give publicity to the facts of a dispute. Characteristic of the labor injunction throughout its wide employment by the federal courts is the use of restraining clauses of vague and harassing significance."

It is against the background provided by this history that this latest attempt to deprive unions of the benefits of

the protections of Norris-LaGuardia must be measured. For here what the Petitioners are attempting to do is to press a restrictive and artificial construction of the removal statute upon this Court so that they may be free to secure a labor injunction. It is this background that causes us to insist that the instant case should, indeed must, be viewed as one that turns on general neutral jurisdictional principles, principles that are not limited to labor law removal cases, and whose effects will not always, or normally, result in decisions which benefit labor unions, employers or any other particular class of litigants. And these principles, as we have shown, compel the conclusion that removal was proper here.

CONCLUSION

For the above stated reasons, as well as those advanced by the Union, the decision of the court below should be affirmed.

Respectfully submitted,

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January, 1968

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SUPREME COURT, U. S.

IN THE

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OCTOBER TERM, 1967

No. 445

AVCO CORPORATION,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SUMMARY OF ARGUMENT

The Petitioner and the Respondents are in full agreement that the criterion to be applied in deciding this case is the *intention of Congress.*

It is clear from the legislative history that in enacting Section 301 in 1947, Congress had no intention of extending the provisions of the Norris-LaGuardia Act to state courts either directly or by indirection. On the contrary, Congress affirmatively intended to continue the operation of Norris-LaGuardia unchanged. Norris-LaGuardia in 1947—as now—applied only to "courts of the United

States." As of 1947, state courts had and exercised jurisdiction to enjoin strikes in breach of contract. Such suits were not removable.

The House of Representatives' proposal to make the restrictions of Norris-LaGuardia inapplicable to Section 301 suits brought in "courts of the United States" and the Senate proposal to have the NLRB seek federal court injunctions against strikes in breach of contract were dropped in conference in 1947 in reliance on assurances that nothing in Section 301 would "encroach upon the existing jurisdiction of the state courts." [1] The manifest intention was to allow state courts to continue, as in the past, to grant the injunctive relief which had been unavailable in federal courts since the enactment of Norris-LaGuardia in 1932.

The Respondents' brief hardly touches on the specifics of whether Congress intended, in 1947, to extend Norris-LaGuardia to state courts. Obviously, the Respondents could find no legislative history to support such a contention, because there is none. The legislative history is to the contrary.

> *"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recogized and obeyed."* (emphasis added) [2]

To construe Section 301 as the Respondents now contend, so that the removal sections of the Judicial Code are triggered into action by Section 301, would completely frustrate the intention of Congress which all agree should be the criterion. It would accomplish by indirection a result opposite to that intended by Congress.

Nothing in Norris-LaGuardia, in Section 301, or in the removal provisions (28 U.S.C. 1441(b)) requires such a

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[1] Charles Dowd Box Co. v. Courtney (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

[2] United States v. Hutcheson (1941) 312 U.S. 219, 235, 85 L. Ed. 788.

frustration of Congressional intention. Norris-LaGuardia itself has never applied to state courts and, therefore, cannot be regarded as reflecting a "national" labor policy, applicable to all tribunals. The "basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." [3] And for removal under 1441(b) the action must "arise under", which means must be "created by", federal statute. A right which has been "absorbed" and "fashioned" into federal law from state law by federal courts, rather than by specific legislation of Congress, is not a right "created by" and thus "arising under" the laws of the United States within the meaning of Section 1441(b). Congress in permitting federal suits under Section 301 did not "destroy the foundation upon which it" built. Rights were created by Tennessee and Petitioner sought to enforce them.

Also, a civil action seeking an injunction for strike in breach of contractual promise is not a civil action of which "district courts have original jurisdiction" within the meaning of 1441(b). Norris-LaGuardia was intended to deprive federal courts of any power to entertain such suits and its drafters achieved that purpose. It deprives district courts of "original jurisdiction" over such a civil action.[4] The word "jurisdiction" means the same in Norris-LaGuardia as in Section 1441(b).

This case calls for "common-sense accommodation" [5] to reflect the intention of Congress. It is abundantly clear from the legislative history and from previous decisions of this Court that in enacting Section 301 Congress had "com-

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[3] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 508-09, 7 L. Ed. 2d 483.

[4] Sinclair Refining Co. v. Atkinson (1962) 370 U.S. 195, 8 L. Ed. 2d 440.

[5] Gully v. First National Bank in Meridian (1936) 299 U.S. 109, 117, 81 L. Ed. 70.

plete awareness of both the existence and the limitations of state court remedies for violation of collective agreements." [6] Also, the purpose of Congress "was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." [7] Accordingly, as Congress "has intimated its will", Section 301, Norris-LaGuardia and Section 1441 (b) should be construed in such a way that the restrictions of Norris-LaGuardia continue to apply only to federal courts leaving state forums free, without removal, to enforce labor contracts through their "usual processes." These include restraining orders and injunctions.

Other arguments advanced by the Respondents and Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, likewise must be rejected. The contention that "a strike injunction is precluded by the terms and tenor" of the agreement between the parties in the instant case is an argument for the state court on the merits and not for a federal court determining the narrow issue of removal. The Respondents elected an attempted removal rather than presentation of this issue to the state court. Likewise, the nature of the state court order and the claimed incompetence of state court judges are arguments quite irrelevant to the removal issue. Restraining orders are not *per se* an "evil", but are a time honored and essential defensive weapon in the arsenal of Equity for the protection of individual litigants and of society itself. Contrary arguments relating to the claimed "evil" of injunctions should be for Congress or state legislatures and not properly for this Court. They have no relevancy to the removal issue.

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[6] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 510, 7 L. Ed. 2d 483.

[7] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 511, 7 L. Ed. 2d 483.

The law review article on which Respondents place principal reliance sheds more heat than light and contains arguments quite irrelevant to the removal issue.

The Respondents' "uniformity" argument is erroneous. Uniformity is not the "desideratum of national labor policy" as demonstrated by *Dowd*,[8] *Hoosier Cardinal*[9] and other decisions. Our federal system encourages "diffusion", not "uniformity", absent specific declaration of Congress not present here.

There is no evidence that in enacting Section 301 Congress intended to prevent "forum shopping." Instead the expressed Congressional purpose was "not to abolish existing state court jurisdiction."[10]

The Federal Rules of Civil Procedure are inapplicable in determining whether a cause is removable.

Zwickler v. *Koota* (1967) 389 U.S. 241, 19 L. Ed. 2d 444, cited by the *Amicus* is inapplicable because the instant case does not involve the issue of federal court "abstention."

The *Amicus* is also in error in stating that a purpose of the removal statute was to insure "that no federal question case is tried in a state court unless both parties wish to have it tried there." (Amicus br., p. 9) There are many instances in which cases involving federal questions are tried in state courts without right of removal.

Injunctions are the only effective remedy against "wildcat" strikes in breach of contract. Their availability to management strengthens the hand of responsible union leaders who want to keep contract promises and maintain labor peace during the contract term. In this era of economic interdependence and concentration of union power, the continued availability of this form of specific perfor-

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[8] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483.

[9] UAW v. Hoosier Cardinal Corp. (1966) 383 U.S. 696, 16 L. Ed. 2d 192.

[10] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 512, 7 L. Ed. 2d 483.

mance is essential for the protection of employers, responsible employees, and the consuming public. Without injunctive relief whole cities can be paralyzed. Certainly our system of compulsory collective bargaining assumes and requires full performance of collective agreements. Only state court injunctive relief can assure such performance.

ARGUMENT

I. The Criterion Is the Intention of Congress.

The Petitioner and the Respondents agree that the criterion to be applied in deciding this case is the *intention of Congress.* The Respondents concede that "the problem, if one exists, and a solution, if one is desired, is for Congress." (Resp. br., pp. 16, 70) Quoting from *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195, 215, 8 L. Ed. 2d 440, they state that " 'it is a question for lawmakers, not law interpreters.' " (Resp. br., p. 70)

The dominance of Congressional "intention and objective" in construing the critical statutes was likewise stressed by the Petitioner in its brief. (pp. 33-35 and 36)

II. Congress Intended that State Courts Should Retain Their Existing Jurisdiction to Enjoin Strikes in Breach of Contract.

It is clear from the legislative history that in enacting Section 301 in 1947, Congress had *no* intention of extending the provisions of the Norris-LaGuardia Act to state courts, either directly or by indirection. On the contrary, Congress affirmatively intended to continue the operation of Norris-LaGuardia unchanged. Norris-LaGuardia in 1947—as now—applied only to "courts of the United States." As of 1947, state courts had and exercised jurisdiction to enjoin strikes in breach of contract. Such suits were not removable.

A proposal to make the restrictions of Norris-LaGuardia inapplicable to Section 301 suits brought in "courts of the United States" and a proposal to have the NLRB seek injunctions in such cases were dropped in conference in 1947 in reliance on assurances that nothing in Section 301 would "encroach upon the existing jurisdiction of the state courts." [11]

In *Dowd Box, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court stated that in considering "the proposed legislation in 1946", which was the precursor of the 1947 Act, "Congress manifested its complete awareness of both the existence and the limitations of state court remedies for violation of collective agreements." 368 U.S. at 510. Some members of the House believed that the need for injunctive relief for strikes in breach of contract was so great that such injunctions should be obtainable in federal courts as well as state courts. Accordingly, as noted by this Court in *Sinclair Refining Co.* v. *Atkinson, supra* (1962) 370 U.S. 195, 205-06, 8 L. Ed. 2d 440, the House bill in 1947, in Section 302(e), provided that in suits for violation of labor contracts Norris-LaGuardia restrictions "shall not have any application in respect of either party." H.R. 3020, 80th Cong., 1st Sess. (1947); 1 Leg. Hist. of the L.M.R.A., 1947, 221-22. The Senate bill contained no such provision, but provided that breach of contract would be an unfair labor practice with injunctive relief available in federal courts through the NLRB.[12] These provisions were compromised out by the Joint Conference Committee through agreement that relief for breach of collective agreements would "be left to the usual processes of the law." H.R. Conf. Rep. No. 510, H.R. 3020, 80th Cong., 1st Sess., pp. 41-42; 1 Leg. Hist. 545-46; *Sinclair Refining Co.* v. *At-*

[11] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

[12] Sections 8(b)(5) and 10(j) of H.R. 3020, 80th Cong., 1st Sess. (1947) as passed Senate, 1 Leg. Hist. 241-42, 258.

kinson, supra (1962) 370 U.S. 195, 207-08, 8 L. Ed. 2d 440. As this Court has found, it was agreed by the conferees that "no change in the *existing* anti-injunction provisions of the Norris-LaGuardia Act should be made." 370 U.S. at 207 (emphasis added). The "existing" anti-injunction provisions of Norris-LaGuardia applied only to *federal* courts. This fact was stated repeatedly by this Court in its *Sinclair* opinion.[13]

Obviously, it was because of this agreement between the members of the House and Senate that Senator Ball, one of the floor leaders for the bill, later stated on the floor of the Senate:

> "[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. It does not go beyond that." 93 Cong. Rec. 5014 (1947); *Dowd, supra*, 368 U.S. at 512.

The agreement underscores the correctness of the statement in *Dowd* that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." 368 U.S. at 511.

The Court also stated that:

> "The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." 368 U.S. at 508-09.

As this Court observed in *United States* v. *Hutcheson* (1941) 312 U.S. 219, 85 L. Ed. 788:

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[13] Sinclair Refining Co. v. Atkinson, *supra* (1962) 370 U.S. 195, 196, 203, 211, 214, 8 L. Ed. 2d 440.

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." 312 U.S. at 235 (emphasis added).

III. Nothing in Section 301, in Section 1441(b), or in Norris-LaGuardia Requires Frustration of the Congressional Intent.

A. The Action Is Not "Founded on a Claim or Right Arising Under the Constitution, Treaties or Laws of the United States."

The Respondents state:

> "Section 301 is the sole source of right that petitioner can invoke. Federal law is the exclusive determinant of the validity, interpretation, and enforcement of the contract which petitioner alleges has been violated. The action therefore is one 'arising under' a law of the United States." (Resp. br., pp. 7-8, 17-20)

It is submitted that such reasoning is erroneous.

This Court has stated that "A suit arises under the law that creates the cause of action." [14] We submit that the law that *created* the cause of action in the instant case was the law of Tennessee, authorized by the Tenth Amendment to the Constitution of the United States.

The mere fact that suit against the union as an entity was authorized by Section 301, that this Court has subsequently held that the substantive law to be applied is to be fashioned by federal courts, and that "any state law applied . . . will be absorbed as federal law", does not mean the action is "founded on a claim or right arising under the Constitution, treaties or laws of the United States."

In the leading case of *Gully* v. *First National Bank in Meridian* (1936) 299 U.S. 109, 81 L. Ed. 70, a federal statute authorized state taxation of stock in national banks,

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[14] American Well Works Co. v. Layne & Bowler Co. (1916) 241 U.S. 257, 260, 60 L. Ed. 987.

subject to specified restrictions. The defendant had contracted to assume the obligations of an insolvent national bank. The state tax collector sued the defendant in the state court to collect the amount of the tax. The defendant sought to remove the action to federal court, claiming that the right of the state to impose the tax in issue arose under a law of the United States and that the action was, therefore, removable. This Court directed remand, stating:

> "That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid." 299 U.S. at 115.

The Court said:

> "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. . . . With no greater reason can it be said to arise thereunder because permitted thereby." 299 U.S. at 116.

In setting forth certain tests to determine whether a cause arises under the law of the United States, the Court stated:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." 299 U.S. at 115.

The Court said:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if

> the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . ." 299 U.S. at 112-13.

The Court concluded its opinion in *Gully* with a "common-sense" test which it referred to as its "compass." The Court said:

> "To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards. . . . What is needed is something of that *common-sense accommodation of judgment to kaleidoscopic situations* which characterizes the law in its treatment of problems of causation. . . . We shall be lost in a maze if we put that compass by." 299 U.S. at 117-18 (emphasis added).

Applying the "common-sense" compass to the instant case, it seems evident that the Petitioner's action did not arise under a law of the United States. It is elementary, of course, that:

> ". . . the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' . . . [a] law of the United States by his declaration or bill." *The Fair* v. *Kohler Die & Specialty Co.* (1913) 228 U.S. 22, 25, 57 L. Ed. 716; *Bell* v. *Hood* (1946) 327 U.S. 678, 681, 90 L. Ed. 939.

The Petitioner in the instant suit clearly relied on state law. It filed a "Bill of Complaint" in the Tennessee Chancery Court which made no reference whatsoever to Section 301. It sought injunctive relief which could not be granted by a federal court. The Petitioner sought to avail itself of the state court's "established jurisdiction over contract

actions" which this Court has found Congress intended to permit and had no intention of taking away.

The fact that, under *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 457, 1 L. Ed. 2d 972, "any state law applied" by the Tennessee court "will be absorbed as federal law" does not alter the situation. The test under Section 1441(b) is whether the Petitioner's claim is one "arising under" Tennessee law or Section 301. As stated above, "A suit arises under the law that creates the cause of action." [15]

Section 301 did not "create" the state law which has been "absorbed." That state law was *created* by the State of Tennessee. One who acquires a Degas or a Rembrandt does not "create" the painting. The contract rights sought to be enforced in this proceeding are rights which arose under state law subsequently absorbed and fashioned by federal courts into federal law. They are not rights created by Congress itself and cannot, in "common-sense" be regarded as rights "arising under" Section 301. This is particularly true if one bears in mind the overriding intention of Congress referred to above—"to fill the gaps in the jurisdictional law of some of the states, not to abolish existing state court jurisdiction. . . . It does not go beyond that." *Dowd Box, supra*, 368 U.S. at 512. ". . . Congress did not intend this remedial measure to destroy the foundation upon which it was built." 368 U.S. at 513.

Other decisions of this Court support the *Gully* rule that not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. In *Puerto Rico* v. *Russell & Co.* (1933) 288 U.S. 476, 77 L. Ed. 903, Congress had passed a statute somewhat analogous in effect to Section 301 specifically authorizing the Treasurer of Puerto Rico to sue in court to collect taxes owed by

[15] American Well Works Co. v. Layne & Bowler Co., *supra* (1916) 241 U.S. 257, 260, 60 L. Ed. 987.

Puerto Ricans under the laws of Puerto Rico. Subsequently, the Treasurer of Puerto Rico brought a tax collection suit in the Insular Court of San Juan. The defendant, claiming that the suit was one "arising under" the law of the United States, sought to remove the case to the United States District Court at San Juan. This Court directed remand. It stated that:

> "*. . . even though petitioner derived its authority to maintain the suit from the Act of Congress, it did not arise under the laws of the United States within the meaning of the jurisdictional statutes.*
>
> "The suit was brought to recover assessments levied under the Act of the Puerto Rico legislature, but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive —not the source of the authority to establish it." 288 U.S. at 483 (emphasis added).

Likewise, in *Shoshone Mining Co.* v. *Rutter* (1900) 177 U.S. 505, 44 L. Ed. 864, this Court had before it an Act of Congress which authorized the bringing of "adverse suits" to determine the title to mining lands. The federal statute specified that the right of possession might be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States" or "by the statute of limitations for mining claims of the state or territory where the same may be situated." Thus, Congress sought to "absorb" state law much as this Court did

in *Lincoln Mills*. In *Shoshone*, the plaintiff filed his "adverse suit" in the state court. The defendant removed. This Court directed remand. Referring to the federal statute, the Court observed that:

> ". . . in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact.
>
> "The recognition by Congress of local customs and statutory provisions *as at times controlling the right* of possession does not incorporate them into the body of Federal law." 177 U.S. at 508.

The Court further stated that:

> "Inasmuch, therefore, as the 'adverse suit' to determine the right of possession may not involve any question as to the construction or effect of the Constitution or laws of the United States, but may present simply a question of fact as to the time of the discovery of mineral, the location of the claim on the ground, or a determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes, it would seem to follow that it is not one which necessarily arises under the Constitution and laws of the United States." 177 U.S. at 509.[16]

While preserving pre-existing state court jurisdiction, Congress permitted the bringing of suits to enforce collective agreements in federal courts by Section 301. Congress did not abolish "the existing jurisdiction of state courts." [17] Petitioner sought only to avail itself of rights created by the State of Tennessee, in the courts of Ten-

[16] See also, Roecker v. United States (CA 5; 1967) 379 F.2d 400, 407-08 *cert. denied* (1967) 36 U.S.L.W. 3237; T. B. Harms Co. v. Eliscu (CA 2; 1964) 339 F.2d 823, 828.

[17] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 509, 7 L. Ed. 2d 483.

nessee. Subsequent proceedings in that court might have raised questions to be decided under applicable principles of federal substantive law. Petitioner raised none. Petitioner asked only for its rights created by the laws of Tennessee. As this Court stated in *Dowd* analyzing Section 301, ". . . Congress did not intend this remedial measure to destroy the foundation upon which it was built." 368 U.S. at 513.

B. The District Court Lacks "Jurisdiction" of *the Cause.*

In their brief (pp. 22-38), the Respondents have placed heavy emphasis on their contention that Norris-LaGuardia only limits the "equity jurisdiction" of federal courts and does not constitute "a divestiture of subject matter jurisdiction." We believe, on the contrary, that Congress meant exactly what it said when it employed the word "jurisdiction"—and not the phrase "equity jurisdiction"—throughout Norris-LaGuardia.

The Congressional employment of the naked noun "jurisdiction" throughout Norris-LaGuardia is discussed on pages 38-39 of our brief and in footnote 36 thereof. Congress did not say "equity jurisdiction." It said "jurisdiction." Indeed, as pointed out on the pages referred to, Congress peppered the Act with the word "jurisdiction", even defining the Act in part as one to "limit the jurisdiction of courts sitting in equity." [18]

The reason for Congress' usage of the big word "jurisdiction" in Norris-LaGuardia was indicated by this Court in *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 203, 8 L. Ed. 2d 440:

> "We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeat-

[18] United States v. United Mine Workers (1947) 330 U.S. 258, 313, 91 L. Ed. 884.

> edly said, was *deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction.*" (emphasis added).

The Court stated that, "For these reasons, the Norris-LaGuardia Act deprives the courts of the United States of *jurisdiction* to enter that injunction. . . ." 370 U.S. at 203 (emphasis added). The Court concluded that:

> "The District Court was correct in dismissing Count 3 of petitioner's complaint for *lack of jurisdiction under the Norris-LaGuardia Act.*" 370 U.S. at 215 (emphasis added).

In arriving at its conclusion that Congress deliberately employed the "broadest of terms" in Norris-LaGuardia and that the District Court, therefore, lacked "jurisdiction" of the cause filed in federal court, this Court no doubt had in mind the words of Mr. Justice Frankfurter, partially quoted in footnote 36 of our brief, stating:

> "The Norris-LaGuardia Act has specific origins and definite purposes and should not be confined by an artificial canon of construction. The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act 'to define and limit the jurisdiction of courts sitting in equity.' It does not deal with the rights of parties but with the power of the courts. Again and again the statute says 'no court shall have jurisdiction,' or an equivalent phrase. Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases." [19]

It is evident that Congress used the big word "jurisdiction" —and meant it—in order to give the greatest possible assurance that no federal court would thereafter, by any

[19] *Id.* See also Frankfurter and Greene, The Labor Injunction (1930) pp. 208-11.

device whatsoever, seek to enjoin concerted activities of employees as a "conspiracy" in restraint of trade.[20] Bearing Congressional intention in mind, it seems evident that "jurisdiction" means "jurisdiction" in Norris-LaGuardia. And "jurisdiction" is the very word employed by Congress in Section 1441(b).

In attempting to add the modifying adjective "equity" before the general noun "jurisdiction" employed by Congress, the Respondents admittedly lean heavily on an analysis by Professor Chafee. (Resp. br., p. 37) Professor Chafee, in turn, placed his principal reliance on "Mr. Justice Stone's distinction in the *Di Giovanni* case [296 U.S. 64, 69]." (Resp. br., p. 37)[21] Chafee, paraphrasing Mr. Justice Stone, stated that Norris-LaGuardia,

> ". . . does not fix a limit on the 'power of a federal court to act'; it merely answers the question 'whether the case is one for the peculiar type of relief which a court of equity is competent to give.'"

This reference to Mr. Justice Stone's opinion contains a significant and critical omission. Mr. Justice Stone actually stated, in the sentence referred to by Professor Chafee:

> "Whether a suitor is entitled to equitable relief in the federal courts, *other jurisdictional requirements being satisfied*, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give." 296 U.S. at 69 (emphasis added).

In the quoted paragraph, the distinguished professor has simply ignored the critical phrase "other jurisdictional re-

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[20] The Respondents concede that proponents of Norris-LaGuardia desired that "the conspiracy and other doctrines which are fundamental in the law of labor combinations should be specifically annihilated." (Resp. br., p. 54, n. 33).

[21] Di Giovanni v. Camden Fire Insurance Ass'n (1935) 296 U.S. 64, 80 L. Ed. 47.

quirements being satisfied." In the instant case, "other jurisdictional requirements" have not been satisfied. Norris-LaGuardia establishes a specific and crucial jurisdictional requirement—and one which cannot be satisfied in the instant case. That statute specifically deprives federal courts of "jurisdiction and authority" to "issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" unless certain circumstances not present in the instant case are alleged and proved.

The difference between the instant case and *Di Giovanni* is apparent. *Di Giovanni* was not a removal case. The plaintiff there sought to invoke equity jurisdiction by combining damage actions which did not meet the jurisdictional minimum applicable in diversity cases and contending that as there was no legal remedy in the federal court, the plaintiff was entitled to equitable relief to avoid multiplicity of suits. The Court concluded that:

> ". . . want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers." 296 U.S. at 69-70.

The Court concluded that the jurisdictional minimum was "applicable alike to suits at law and in equity", thus holding, as this Court should in the instant case, that "other jurisdictional requirements" were not satisfied. 296 U.S. at 69-70.[22]

In *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 209, 8 L. Ed. 2d 440, the Court rejected "accommodation" and "judicial obliteration" of the language of

[22] Bakery Sales Drivers Union v. Wagshal (1948) 333 U.S. 437, 92 L. Ed. 792, cited by the Respondents at pages 34-35, throws no light on the problem. The result would have been the same whether the word jurisdiction placed in the Act was construed as the Petitioner here contends or as the Respondents contend. The point at issue was the scope of Section 4's definition of "a labor dispute" and the appellate courts' jurisdiction.

Norris-LaGuardia and gave a literal construction to that Act. The Court emphasized that it was going to construe Norris-LaGuardia to get "a correct judicial interpretation of the *language of the Act as it was written by Congress.*" 370 U.S. at 202 (emphasis added). The Court stated that Norris-LaGuardia was "*deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction.*" 370 U.S. at 203 (emphasis added). In footnote 13, the Court stated that:

> "The rights of the parties and *the jurisdiction of the federal courts* are to be determined according to the express provisions applicable to labor disputes as so defined." 370 U.S. at 203 (emphasis added).

The Court specifically concluded that, "[f]or these reasons, the Norris-LaGuardia Act *deprives the courts of the United States of jurisdiction* to enter that injunction. . . ." 370 U.S. at 203 (emphasis added). Indeed, this literal construction placed on the Act by the *Sinclair* majority led one dissenting Justice to refer in his opinion to "today's literal reading" and to predict that "if § 4 is to be read literally, removal will not be allowed." 370 U.S. at 226-27. Accordingly, this Petitioner cannot believe that this Court, having construed Norris-LaGuardia literally in deciding that employers may not seek injunctions for breach of labor contracts in federal courts, will now construe Norris-LaGuardia less literally when the effect of so doing will be to close the doors of state courts to injunctions against strikes in breach of contract, disregarding clear Congressional intent.

Respondents' argument that Norris-LaGuardia preserved "jurisdiction" (they denominate as "subject matter jurisdiction") in federal courts in these cases is erroneous for yet another reason. It completely overlooks Norris-LaGuardia's historical setting. In 1932, six years prior to

the union of law and equity in federal courts, it was clear beyond doubt that no suit for injunction was cognizable "at law." [23] Jurisdiction of such suits lay "in equity." This Court had long since held that where a federal court sitting "in equity" acted beyond its "jurisdiction" its judgment was "null and void." *In Re Sawyer* (1888) 124 U.S. 200, 221, 31 L. Ed. 402. Just six years before enactment, in 1926, this Court had held that "jurisdiction" meant the "power to entertain the suit, consider the merits and render a binding decision thereon . . . ." *General Investment Co.* v. *New York Central Railroad* (1926) 271 U.S. 228, 230, 70 L. Ed. 920.[24] Thus, Congress in "limiting the jurisdiction of courts sitting in equity" was nailing the doors to federal courts shut tight. No federal court had power to entertain a suit seeking such relief. Respondents' arguments based upon the Federal Rules (not promulgated until 1938) and Moore's remarks on federal practice under them are simply anachronisms.

For example, on page 25 of the Respondents' brief, Moore is quoted as saying that the "prayer for relief constitutes no part of the pleader's cause of action", but Moore was merely discussing the provision to such effect contained in Federal Rule 54(c). We have pointed out on pages 43-44 of our brief why Rule 54(c) is inapplicable in resolving the jurisdictional question here presented.[25] Actually, the very language of Norris-LaGuardia makes the prayer of the complaint the benchmark of jurisdiction. The statute deprives the federal court of jurisdiction "to issue any

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[23] 1 Pomeroy, Equity Jurisprudence §§ 137-38 (4th Ed. 1918); Conformity Act of June 1, 1872, § 5, 17 Stat. 196-97.

[24] The additional portions of the quotation italicized by the Respondents on page 24 of their brief detract in no way from the controlling force of the above definition because they relate to only one element of the jurisdictional equation.

[25] Respondents' citation of 6 Moore's Federal Practice on page 25 of its brief similarly relates solely to actions brought in the federal courts to which Rule 54 would clearly be applicable.

restraining order or temporary or permanent injunction . . ." [26] One must look at the prayer to see whether the Petitioner has sought the type of relief which deprives the court, under the language of the statute, of "jurisdiction." [27]

At pages 35-37, the Respondents refer to statutes other than Norris-LaGuardia which have been related to courts' "general equity powers." None of these statutes employs the critical noun "jurisdiction" which was used by Congress throughout Norris-LaGuardia. This demonstrates that Congress intended to shut the door in Norris-LaGuardia and did not intend to do so in enacting the other statutes. And the language and scope of each statute is significantly different from that of Norris-LaGuardia.

There is no basis for the Respondents' contention, on page 26, that the Petitioner was guilty of "obduracy" because it chose to "restrict [itself] to the one form of relief not within the court's authority to grant . . . ." The relief sought was within the authority of the Chancery Court in which the Petitioner chose to file its petition. It is not "obdurate" to seek relief from the only tribunal empowered to grant it. This is not "procedural jugglery" (Resp. br., p. 26) or "game-playing" (Resp. br., p. 27) or "sleight of hand" (Resp. br., p. 28), but simply common sense. The Petitioner merely asked the Chancery Court to exercise its "existing jurisdiction" through "the usual processes of the law." (*Dowd*, 368 U.S. at 509; *Sinclair*, 370 U.S. at 207)

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[26] Section 1, 47 Stat. 70, 29 U.S.C. 101 (1964).

[27] It will also be noted that in the Bill of Complaint filed in the Chancery Court, the Petitioner alleged a "series of work stoppages" (A. 7), all of which "were sanctioned by defendant Local in violation of Article XIII of" the collective bargaining agreement and that these "constituted concerted action on the part of defendants, and that complainant is entitled to an injunction. . . ." (A. 8) Thus, the body of the Bill of Complaint, and not simply the prayer, contained the essential allegations for a proceeding in equity entitling the Petitioner to the traditional Chancery remedy of injunctive relief.

IV. Arguments Advanced by Respondents and Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, Must Be Rejected.

A. Construction of the Avco Contract Is for the State Court.

At pages 66-67, the Respondents state that "it is strongly arguable that a strike injunction is precluded by the terms and tenor of the agreement" between the Petitioner and Respondents. Obviously, this is an argument which should be addressed, if at all, to the state court which issued the injunction. It goes to the merits and has no relevancy to the removal issue pending before this Court. Instead of attempting to present this issue to the state court, the Respondents elected to remove. This precluded any review of the correctness of the state court order.

B. The Nature of the State Court Order Is Irrelevant.

Throughout their brief, the Respondents repeatedly attack the state court injunction because it was *ex parte*, assertedly entered without notice, and not appealable because not a final order. (Resp. br., pp. 4, 59, 67-68) These contentions are irrelevant to the issue of removability. Under the statute, the right to remove turns on the nature of the claim and not whether a state court order was "final" or appealable.

Also, removal does not depend on whether a state court order was entered with or without prior notice to the other party. The Respondents' whole point is actually a red herring because, although the record is silent on the subject (A. 10), counsel for the Respondents was, in fact, notified before the application for the temporary order was presented to the Chancery Court. Even in the absence of notice, the Respondents could promptly have obtained a full hearing by merely filing a motion to dissolve the restraining order.

In the instant case, the removal issue would be the same if the injunction had been permanent and appealable, rather than temporary and not appealable, and had been issued after trial rather than before a trial on the merits.

C. The Quality of State Court Judges Is Irrelevant.

On pages 43 and 58-60, the Respondents reflect on the quality of state court judges, stating that they are "insufficiently informed" (Resp. br., p. 59) and that if removal is denied "these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy." (Resp. br., p. 43) The Respondents seem to have overlooked the fact that in *Charles Dowd Box Co.* v. *Courtney, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, this Court decided that Congress had intended for state court judges to have jurisdiction to enforce labor contracts. If the Respondents disagree with this, it would seem that these objections should be addressed to Congress.

Many federal judges, including Justices of this Court, have served as state court judges before their appointment to the federal judiciary. It is absurd to suggest that they were not as well informed, as conscientious, and as competent to construe and apply federal law when they were serving on the state bench as after they began their service as federal judges. State court judges and federal judges are not two different kinds of people.

It is elementary, of course, that under our dual system of courts, the state courts have concurrent jurisdiction with federal courts over both state and federal law unless Congress has expressly or by necessary implication granted exclusive jurisdiction to the federal courts.[28]

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[28] Moore, Federal Practice, 2nd Ed., Vol. 1, Sec. 0.6[3], pp. 227-236. "In considering the dual system we see, then, that the state courts play an important role in connection with the cases and controversies that are within federal judicial power." *Id.* at 236.

D. It Is for Congress, and Not the Courts, to Decide Whether State Court Injunctions Are to Be Abolished.

The Respondents argue at some length that injunctions to stop a strike in breach of contract are unnecessary and, indeed, "almost an irrelevancy." (Resp. br., pp. 15-16, 64-69) Such arguments, of course, are for Congress, and not this Court. Removability does not turn on whether injunctions are socially desirable, or an "evil", as the Respondents contend. The fact is that state courts have been granting such relief for generations and, as demonstrated above, Congress has not yet attempted to deprive state courts of such jurisdiction. This Court's function is to carry out the will of Congress rather than to fashion law which will frustrate the will of Congress.

The Respondents' observations on the efficacy of injunctions do underscore and highlight the urgent need for a reversal of the erroneous decision of the Sixth Circuit. The Respondents reason that:

> "The overall incidence of strikes over grievances submissible to arbitration is doubtless quite small, so that in perspective we deal with a fairly minor matter." (Resp. br., p. 15)

We know of no evidence in the record to support this statement. Even if it were true that there are today few strikes over grievances submissible to arbitration, it does not follow that this proves strike injunctions are a "minor matter." Is it not equally arguable—and much more consistent with common sense—that if this is true it is because of the ready availability of state court injunctions against such violations? It is as though one were to argue that the crime statistics issued by the FBI, showing that only a relatively few people in our population of two hundred million attempt to commit murder, prove that laws against

murder are unnecessary. Obviously, to some degree at least, the relatively small incidence of murder is because of the existence of laws which make murder a crime, and of legal remedies which punish the malefactor.

With no authority, the Respondents state that:

> "... most strikes in breach of a no-strike promise are wildcat in character and therefore unauthorized by the union, and which the union is already doing its best to stop ..." (Resp. br., p. 15)

Obviously, union leaders who may instigate a strike in breach of contract will claim the strike is "unauthorized" as a defense against possible liability. This does not mean that the strike is truly "unauthorized." But even if the Respondents' reckless and unsupported statement were true, it would not evidence a lack of need for the state court injunctive remedy. If the union is "already doing its best to stop" the strike, and cannot get it stopped, the union leadership should welcome the assistance of a state court injunctive order helping them to comply with their contractual obligation.

The Respondents state that the injunctive remedy is not needed because "the employer is free to discharge or discipline strikers and their leaders" (Resp. br., p. 15) but obviously such "discharge or discipline" may martyrize the leaders and simply prolong the work stoppage.

The Respondents make the extraordinary statement that:

> "... the system of agreed submission of grievances to arbitration and the concomitant adherence to a no-strike promise is not dependent on the availability of legal sanctions to make it work and is not repairable by legal sanctions if it does not work." (Resp. br., p. 16)

If so, why the trilogy? [29] It is as plain as daylight that the grievance-arbitration system *is* dependent on and repairable by "legal sanctions" and is *not* "essentially an autonomous system of self-government" dependent solely on the "self-determined commitment of the parties to it" as claimed by the Respondents. (Resp. br., p. 16) Far from being "an irrelevancy", the availability of the strike injunction in the state court has been one of the important sanctions encouraging union compliance with the grievance and arbitration procedures and observance of the all important no-strike promise.

The Respondents note that strikes during the term of an agreement are only approximately 11½% of the total work stoppages (Resp. br., p. 65, n. 39) and deduce from this statistic that such strikes are, therefore, a "minor matter." (Resp. br., p. 15) Department of Labor figures for 1967 show 41,000,000 man days of work lost through strikes. (67 LRR 54) 11½% of this total would be almost 5,000,000 man days of work lost in strikes while contracts were in force. This is hardly a "minor matter."

The Respondents' irrelevant remarks about the "inefficacy of a strike injunction" (Resp. br., p. 16) are answered by their own acknowledgment that the "issuance of a strike injunction determines the outcome of a strike." (Resp. br., p. 55)

In an apparent effort to stir the emotions of the Court, the Respondents repeatedly refer throughout their brief to a strike injunction as an "evil." It is true that in 1932, when Norris-LaGuardia was enacted, the type of federal court injunction which occasioned the legislation was regarded by many members of Congress as an "evil." But the prin-

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[29] United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 4 L. Ed. 2d 1409; United Steelworkers of America v. American Mfg. Co. (1960) 363 U.S. 564, 4 L. Ed. 2d 1403; United Steelworkers of America v. Enterprise Wheel & Car Corp. (1960) 363 U.S. 593, 4 L. Ed. 2d 1424.

cipal injunction there under consideration was one enjoining concerted action by labor organizations on the theory that such combinations constituted a "conspiracy" in violation of the Clayton Act. In *New Negro Alliance* v. *Sanitary Grocery Co.* (1938) 303 U.S. 552, 82 L. Ed. 1012, this Court said, at page 562, that Norris-LaGuardia was enacted to "obviate the results of the judicial construction" theretofore given the Clayton Act.

In *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, this Court held that the broad language employed by Congress in Norris-LaGuardia must be construed literally, and so construed forbids even injunctions against breach of contract. This fact, of course, does not mean that a strike in breach of contract was the "evil" that Congress had in mind in enacting Norris-LaGuardia, and certainly does not mean that injunction against a strike in breach of contract is itself an "evil." A court order which requires the party to a contract to keep his promise cannot possibly be regarded as an "evil." An injunction to compel union compliance with a no-strike promise is a beneficent order—*not* an "evil." It is just as beneficent as an order to compel employer compliance with a promise to arbitrate a grievance.

Although the desirability of state court injunctions is for Congress and not the courts, the importance of state court injunctions and the importance of the decision in the instant case to labor peace in this country cannot be minimized by statements such as those of the Respondents discussed above.

E. The Law Review Article on Which the Respondents Place Reliance Sheds More Heat than Light.

Throughout their brief, and most particularly at pages 56-59, the Respondents place great reliance on parts of an

article on the subject published in a distinguished law review. Unfortunately, many of the intemperate arguments set forth in the article are erroneous on their face and, thus, throw little light on the problems presented to this Court by the instant petition.

The author of the article says state court judges "will have only slight familiarity, if any, with industrial relations practice" and frequently

> ". . . will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently well informed about the case to reach a reasonable judgment concerning the need for a restraining order." (Resp. br., p. 58)

But there is no reason to believe that a state court judge would have more "desire to get rid of the case," or less familiarity with industrial relations practice and labor law, than a federal district judge. Congress decided, as this Court concluded in *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, that state court judges were sufficiently competent to hear damage suits. If so, they are surely sufficiently competent to decide injunction suits.

The author's attack on "rules of evidence" which "practically always assure that [the judge] will not hear enough that is relevant" (Resp. br., p. 58) would also apply equally to federal courts. Congress believes in rules of evidence. In Section 10(b) of the Act, it required even the National Labor Relations Board to apply "so far as practicable" the "rules of evidence applicable in the district courts." 29 U.S.C. § 160(b) (1964).

The author criticizes state court judges who grant temporary restraining orders because statistics for Los Angeles

County show that subsequently such judges tend to grant "motions for preliminary injunctions in the same cases." (Resp. br., p. 58) He claims this shows,

> ". . . that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves." (Resp. br., p. 58)

Or possibly it shows they were right the first time.

The author also says that:

> "It seems more than likely, therefore, that many temporary restraining orders and preliminary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed." (Resp. br., pp. 58-59)

But the author has no evidence to support either his statement that such orders are "improperly issued" or that state court judges are "insufficiently informed."

Obviously, if there is something wrong with temporary restraining orders the remedy is for legislators to forbid them entirely—and in all cases, not just labor cases. Actually, the restraining order is a historic and commonly employed weapon in the arsenal of Equity, utilized by Chancellors for the protection of litigants in all phases of human activity whenever the legal remedy is inadequate. It affords speedy relief when time is of the essence. As so employed, it is a manifest good, and not an "evil."

F. The Respondents' "Uniformity" Argument Is Erroneous.

Throughout their brief, the Respondents have repeatedly emphasized their view that:

> "Uniformity is the desideratum of national labor policy and fits the ideal of the evenhanded rule of law." (Resp. br., pp. 12, 46-53)

The authorities cited for this view support only a much narrower proposition. Both *San Diego Building Trades Council* v. *Garmon* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, and *Guss* v. *Utah Labor Relations Board* (1957) 353 U.S. 1, 1 L. Ed. 2d 601, (cited by the Respondents in footnote 22, page 46 of their brief) hold only that in the area assigned by Congress to the National Labor Relations Board the national policy is one of uniformity and Board jurisdiction preempts state jurisdiction. In *Guss, supra*, this Court observed that:

> ". . . in each case the question [of the state's power to act] is one of congressional intent. . . . And here we find not only a general intent to pre-empt the field but also the proviso to § 10(a), with its inescapable implication of exclusiveness." 353 U.S. at 10.

Likewise, in *Garmon, supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, the Court observed that:

> "The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and recurring concern. As we pointed out the other day, 'the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation.' " 359 U.S. at 241.

The Court also stated that:

> "However, due regard for the presuppositions of our embracing federal system, including *the principle of diffusion of power* not as a matter of doctrinaire localism but *as a promoter of democracy*, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and respon-

> sibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44 (emphasis added).

It is evident, therefore, that under our Constitution and federal system, our national policy is one of "diffusion of power . . . as a promoter of democracy" and not one of "uniformity." This principle was emphasized by this Court when, speaking through Mr. Justice Brandeis, in *Erie R.R.* v. *Tompkins* (1938) 304 U.S. 64, 82 L. Ed. 1188, it stated that:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law." 304 U.S. at 78.

The Respondents state that:

> ". . . a federal judicial 'haven' is essential if federal policy is to be fully effectuated by law interpretation and fact determination responsive to the congressional plan." (Resp. br., pp. 39-40)

and that:

> "Without removal these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy." (Resp. br., pp. 42-43)

If Congress had agreed with such reasoning, it could very easily have provided, in enacting Section 301, that the jurisdiction of federal courts to enforce labor agreements would be exclusive. This is what Congress did in the National Labor Relations Act in an area where it thought federal law should be uniform and where it wanted to remove jurisdiction over the subject from the state courts.[30]

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[30] Section 10(a) Labor Management Relations Act, 1947, 29 U.S.C. 160(a) (1964).

This Court, in *Garmon, supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775, *Guss, supra* (1957) 353 U.S. 1, 1 L. Ed. 2d 601, and numerous other decisions to the same effect, has respected the intention of Congress as so expressed. In the area of contract enforcement, however, Congress did not distrust the states or consider them to be "inhospitable or unaware of national labor policy." This Court has found that Congress gave state courts concurrent jurisdiction over suits to enforce labor agreements.[31] The concept of "uniformity" was so foreign to the intention of Congress that even the applicable statute of limitations[32] and the applicable statute of frauds[33] were left by Congress to the states. In the words of Senator Ferguson " '[i]t takes away no jurisdiction of the State courts.' " *Dowd, supra*, 368 U.S. at 512.

The Respondents' contentions that the concept of "uniformity" is "not limited to the substantive interpretation of the contents of the collective bargaining agreement but extends to procedure and remedy as well" (Resp. br., pp. 12-13), and that Congress sought "to prevent 'forum shopping' by parties looking for a break under one set of rules or another" (Resp. br., p. 53) are conclusively refuted by *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, and *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L. Ed. 2d 192.

As an argument against state court injunctions, the Respondents assert, "There is no uniformity from one state court to another. Strike injunctions are grantable in some state courts but not in others." As pointed out above, our Constitution and federal system contemplates lack of uni-

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[31] Dowd, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483.
[32] UAW v. Hoosier Cardinal Corp. (1966) 383 U.S. 696, 16 L. Ed. 2d 192.
[33] Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, (CA 6; 1951) 193 F. 2d 209, *cert. denied* (1952) 343 U.S. 966, 96 L. Ed. 1363.

formity. On many issues there is even lack of uniformity in the federal courts. On the issue in the instant case, the rule in the Third Circuit, as enunciated in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L. Ed. 2d 822, was different from the rule in the Sixth Circuit. Indeed, it is elementary that on many issues rulings differ from circuit to circuit, and "forum shopping" among the several circuits in all fields of the law is common by petitioners who seek the circuit with the most favorable rule. Of course, diversity of decision on specific points can ultimately be resolved by the Supreme Court through the certiorari process, and diversity of decision among the several states can also be resolved in the same way.

In *Dowd, supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, this Court said:

> "Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." 368 U.S. at 507-08.

The Court also said:

> "It is implicit in the choice Congress made that 'diversities and conflicts' may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law." 368 U.S. at 514.

On page 51, the Respondents refute their own "uniformity" argument by acknowledging that:

> "A § 301 action is maintainable even though the promise to be enforced duplicates a command of the National Labor Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), or the controversy is otherwise within the regulatory scope of that Act (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261) . . . This Court holds that procedural arbitrability is to be determined by the arbitrator. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 554-559." [34]

As a reason for denying state court authority, and in support of its "uniformity" reasoning, the Respondents state that otherwise:

> "The employer might bring an action seeking a strike injunction in a state court and a separate action seeking damages in a federal court . . . An employer might seek injunctive relief in a state court and the union might seek a declaratory judgment based on the same events in a federal court." (Resp. br., p. 49)

But there is nothing novel about this. On this subject, Moore states, "the federal and state courts have concurrent jurisdiction, as, for example, in diversity and general federal question cases, actions *in personam* may proceed concurrently." Moore, 2d Ed., Vol. 1A, Sec. 0.221 at page 2605. He further states:

> "In the exercise of discretion a federal court should normally deny a declaratory judgment where the issues raised may be fully adjudicated in a suit pending in a state court at the time the federal declaratory judgment action is instituted." Moore, 2d Ed., Vol. 1A, Sec. 0.220, p. 2603.

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[34] Respondents' quotation at page 51 from San Diego Building Trades Council v. Garmon, *supra* (1959) 359 U.S. 236, 3 L. Ed. 2d 775 that "remedies form an ingredient of an integrated scheme of regulation" is similarly inapposite because Section 301, while conferring jurisdiction on federal courts, does not purport to establish any "integrated scheme of regulation."

Thus, the problem which the Respondents pose as a threat is a common one readily answered through the accommodations familiar to our federal judicial system.

As a corollary of their "uniformity" argument, the Respondents repeatedly assert that Norris-LaGuardia defines "national labor policy" and that Section 4 of Norris-LaGuardia has been "read into" Section 301. (Resp. br., pp. 14, 53-61) But, as pointed out above, Norris-LaGuardia, by its terms, applies only to courts of the United States, and Section 13(d) thereof defines such courts as those "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress . . ." If Congress had intended Norris-LaGuardia to state national labor policy, it would have written the Act to apply to *all* courts—*not* just to federal courts.

The oft repeated statements that this Court, in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, "read Section 4 of the Norris-LaGuardia Act into Section 301 of the Taft-Hartley Act" (Resp. br., p. 61) and that under *Sinclair*, Norris-LaGuardia has been "incorporated in the National Labor Relations Act" (Resp. br., p. 54) are quite inaccurate. In *Sinclair*, this Court did not read Section 4 into Section 301. It affirmatively held, as the Petitioner here contends, that in enacting Section 301, Congress did not intend to change the *existing* coverage of Norris-LaGuardia. The Court said that Congress had expressed its "purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act" (370 U.S. at 213) and specifically defined these provisions as proscribing "federal labor injunctions" (370 U.S. at 211) and restricting "courts of the United States of jurisdiction to enter" such injunctions. 370 U.S. at 203.

Clearly, the mere fact that Congress has enacted an applicable law does not in and of itself automatically deprive state courts of their historic jurisdiction. In 1947,

concurrently with the enactment of Section 301, Congress enacted Section 8(b)(1) of the Act. That section forbade union coercion of employees and made such conduct an unfair labor practice enforceable by the National Labor Relations Board. Even so, this Court held that the states retained their historic right to punish and enjoin strike violence. *UAW* v. *Wisconsin ERB* (1956) 351 U.S. 266, 100 L. Ed. 1162. Subsequently, the Court held that despite Section 8(b)(1) a state court could also enjoin non-violent "massed name-calling" where this was "calculated to provoke violence." *Youngdahl* v. *Rainfair, Inc.*, (1957) 355 U.S. 131, 2 L. Ed. 2d 151.

In the *Auto Workers* case, *supra*, the Court looked to Congressional intention in concluding that the states retain their historic authority to maintain law and order in the community. After reviewing legislative history, the Court said it was "obvious" that Section 8(b)(1) "was not to be the exclusive method of controlling violence even against employees" and that:

> "The Act does not have such regulatory pervasiveness. The state interest in law and order precludes such interpretation." 351 U.S. at 272.

The Court concluded:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an Act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." 351 U.S. at 274-75.

Comparable considerations in the instant case likewise require the conclusion that Congress intended the states to retain their usual jurisdiction to enjoin strikes in breach of contract, and that Section 301 and Section 1441(b) must

not be construed in such a way as to deprive the states of this historic jurisdiction. The impact of "wildcat" strikes on a local community sometimes can be as burdensome as acts of violence.

At pages 48-49, the Respondents misquote the petition for certiorari, stating that:

> "According to the petition for a writ of certiorari (p. 19), strike injunctions to enforce a no-strike promise are unavailable in fourteen states."

The Petitioner merely stated that "ten of the twenty-four States which currently have 'little Norris-LaGuardia Acts' . . . do not apply such Acts to strikes in breach of contract", and listed such states in footnote 17 to the certiorari petition. The Petitioner did not mean to imply that the other fourteen states have a contrary rule. The Petitioner simply was unable to find any decisions one way or another in most of such states and so could not express an opinion as to how such statutes are construed or whether they have ever come before the courts.

G. Arguments Advanced by Amicus Curiae, AFL-CIO, Are Erroneous.

The Amicus Curiae, American Federation of Labor and Congress of Industrial Organizations, in addition to arguments which have been answered above, advances additional arguments:

(1) *Zwickler* v. *Koota* (1967) 389 U.S. 241, 19 L. Ed. 2d 444, discussed on pages 8-9, is irrelevant to the issues in the instant case. *Zwickler* explores only "the scope of the discretion of the district courts to abstain from deciding the merits of a challenge that a state statute on its face violates the Federal Constitution." 389 U.S. at 245. The gist of *Zwickler* is that a federal court should *not abstain* from determining the validity of a state statute when it

Likewise, while Congress has invested the federal district courts with "original jurisdiction" of all civil actions "between citizens of different States" (28 U.S.C. § 41(1)(b) (1928), now 28 U.S.C. § 1332(a)(1) (1948)), and has thereby negatived jurisdiction absent a federal question where diversity of citizenship does not appear, lack of diversity does not void a judgment for want of jurisdiction. *McCormick* v. *Sullivant,* 10 Wheat. 192; *Des Moines Navigation & R.R. Co.* v. *Iowa Homestead Co.,* 123 U.S. 552. The judgments "are erroneous," reversible on appeal, but "they are not absolute nullities." *McCormick* v. *Sullivant,* 10 Wheat. 192, 199.

Finally, while the Constitution limits the "judicial Power" of the United States to "Cases" and "Controversies" (Art. II, Sec. 2), a decree is not open to collateral attack for lack of jurisdiction on the ground that there was no case or controversy essential to the exercise of judicial power. The "objection is not open on a motion to vacate. The court had jurisdiction both of the general subject matter—enforcement of the Anti-Trust Act—and of the parties. If it erred in deciding that there was a case or controversy, the error is one which could have been corrected only by an appeal or by a bill of review." *Swift & Co.* v. *United States,* 276 U.S. 311, 326. And the same is true of an objection that an injunction oversteps statutory limitations and therefore "renders the decree a nullity." *Id.* at 330. The "error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much." *Id.* at 331.

In no meaningful analytical sense are these constitutional and statutory limitations different from the restrictions contained in the Norris-LaGuardia Act. Chafee, Some Problems of Equity, 369-372, 325-326

(1950). In all the limitations subsume the existence of judicial power but cabin its exercise. So with the Norris-LaGuardia Act. The term "jurisdiction" in the Norris-LaGuardia Act "refers to right principles of judicial action and not to power." *Id.* at 372.

4. The upshot

We have shamelessly drawn for our analysis on Professor Zechariah Chafee's penetrating study in Some Problems of Equity, 296-380 (1950). ". . . [E]quity jurisdiction is something entirely different from jurisdiction over the subject matter." *Id.* at 305. ". . . '[W]ant of equity jurisdiction' is not want of power. The possibility of awarding damages or some other form of legal redress is enough, and it is immaterial that only equitable relief is asked." *Id.* at 320. And this basic approach exactly fits the Norris-LaGuardia Act, as Professor Chafee tellingly explained (*id.* at 367-368):

> Does the Norris-LaGuardia Act limit the power of the trial judge or merely lay down right principles for his decision? . . . [C]learly the district judge had jurisdiction of the parties, and . . . he also had jurisdiction over the subject matter. The district court did have power to decide labor disputes, and it could at least award damages for acts which, the statute said, were not to be enjoined. This being so, nothing further was required to give the court power to act, which includes power to act wrongly. The Norris-LaGuardia Act, to repeat Mr. Justice Stone's distinction in the *DiGiovanni Case* [296 U.S. 64, 69], does not fix a limit on the "power of a federal court to act"; it merely answers the question "whether the case is one for the peculiar type of relief which a court of equity is competent to give." In short, the Act says, in effect, "No court shall have equity jurisdiction"; and lack of equity jurisdiction . . . is not lack of power.

Accordingly, "the preclusion of injunctive relief or 'equity jurisdiction', by force of the Norris-LaGuardia Act, is not an ouster of such 'original jurisdiction' of the district court over the parties and the subject matter as the removal statute contemplates and, in this kind of case, section 301 creates. The classic exposition of this position by Professor Chafee is so familiar, clear and fully reasoned that anything more than a citation of his analysis would be supererogation." Hastie, C.J., dissenting in *American Dredging Co.* v. *Local 25, Marine Division*, 338 F. 2d 837, 858 (C.A. 3), cert. denied, 380 U.S. 935.[16]

[16] To support a contrary view, petitioner invokes (br. p. 35, n. 31) Moore, Federal Practice, 2d Ed., Vol. 1A, Sec. 0.167[7], pages 1004-05, but the reliance is misplaced. Thus, at the cited pages, as is apparent from the cases in notes 15 and 16, the author is treating with lack of subject matter jurisdiction by reason of the preemption of the controversy by the National Labor Relations Board under the National Labor Relations Act. Preemption does go to the power of the court over the subject matter of the controversy (*In re Green*, 369 U.S. 689); it "involves the fundamental question of whether the . . . courts had any power whatever to adjudicate the dispute between the parties. Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act" (*Liner* v. *Jafco*, 375 U.S. 301, 306). Where preemption is the source of the court's incompetence to act, it does affect the subject matter jurisdiction of the court; and in that circumstance the question on removal is whether the federal court's undoubted authority to decide that the dispute is arguably within or without the ambit of the National Labor Relations Act is sufficient retention of judicial power to effectuate removal, even though an affirmative answer to the arguability question then divests the court of power to hear and decide the controversy. There is no such issue on removal of a § 301 action; a § 301 action is not preempted even though the underlying claim would also be cognizable by the NLRB (*Smith* v. *Evening News Assn.*, 371 U.S. 195); subject matter jurisdiction is therefore not implicated in any way. When, at p. 1009 of the treatise, the author addresses a § 301 action directly, it is unclear what his position is.

C. Removal of a § 301 Action Comports With the Purpose of Congress in Establishing Federal Question Removal

With the investiture by Congress of federal question jurisdiction in the federal courts these courts " 'became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Zwickler* v. *Koota,* No. 29, October Term, 1967, sl. op. p. 6, decided December 5, 1967. One means by which to effectuate this primacy was to establish federal question removal in order to provide the defendant as well as the plaintiff with a federal forum for the determination of federal questions. "It was deemed further advisable to give the right of access to the federal courts, in cases involving federal questions, not only to the plaintiff, but also to the defendant, who had been sued in the courts of a state, as more or less essential to the proper administration of the federal laws." Dobie, Federal Procedure, § 88, p. 346 (1928). Original federal question jurisdiction and federal question removal therefore draw their reason for being from the identical source. Hart and Wechsler, The Federal Courts And The Federal System, 729-733, 1019-1020 (1953). Congress established a national system of federal trial and appellate courts in order to assure independent, informed, uniform, and unparochial administration of federal law (Mishkin, *The Federal "Question" In The District Court,* 53 Colum. L. Rev. 157 (1953)); "a full system of independent federal courts plays a valuable part in furthering the rapid, widespread, yet uniform and accurate, interpretation of federal law" (*id.* at 171); and it plays perhaps an even more important role in fact finding upon which the application of law is crucially dependent (*id.* at 172-176); in totality, therefore, a federal judicial "haven" is essential if

federal policy is to be fully effectuated by law interpretation and fact determination responsive to the congressional plan (*id.* at 195). *See England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 416-417.

Removal of a § 301 action is in full keeping with the general recognition of " 'the primacy of the federal judiciary in deciding questions of federal law.' " *Zwickler* v. *Koota,* No. 29, October Term, 1967, sl. op. p. 10, decided December 5, 1967. As a § 301 action is exclusively bottomed on a federally-created right, removal is the precise means that Congress affords to a defendant to secure a federal forum to hear and decide a federal claim. In this case, in denigrating removal, the silent premise of petitioner's argument—and its major flaw—is that it travels from an allegation of a contract violation to entry of a strike injunction with no intermediate stop. But it is just at the trial stopover in putting the allegation to proof to determine whether a contract violation is shown, upon which the grant of any relief is dependent, that federal questions of law and fact are crucially implicated and for the adjudication of which a federal forum is provided by removal.

Illustrative federal questions that may be presented are these: (1) Was there any strike at all? *Drake Bakeries* v. *Local 50, American Bakery Workers,* 370 U.S. 254, 258, 266. (2) Was the strike over a matter expressly excepted from the scope of the no-strike promise? (3) Was the strike impliedly excepted from the scope of the no-strike promise because it was called over a matter expressly excepted from submission to final and binding arbitration? *Cf., Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 106. (4) In the

absence of an express no-strike promise, should one "be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration"? *Ibid.* (5) If the implication of a no-strike commitment is confined to arbitrable disputes, has "compulsory and binding arbitration . . . been agreed upon, and, if so, . . . what disputes have been made arbitrable"? *Ibid.* (6) While providing for compulsory terminal arbitration, does the agreement by its terms and history nevertheless negative a promise on the part of the union not to strike over an arbitrable matter? Compare *International Union, U.M.W.* v. *N.L.R.B.*, 103 App. D.C. 207, 257 F. 2d 211, with *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346 (C.A. 6), affirmed on this question by an equally divided court, 361 U.S. 459. (7) Has the employer repudiated its promise to arbitrate the matter in controversy so as to free the union to strike over it? *Cf., Drake Bakeries* v. *Local 50, American Bakery Workers*, 370 U.S. 254, 260-263; *Vaca* v. *Sipes*, 386 U.S. 171, 185. (8) Was the strike provoked by and in protest against serious unfair labor practices and therefore not within the purview of the no-strike promise? *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 279-284. (9) Is a refusal to work because of an abnormally dangerous working condition not a strike as a matter of law so that the no-strike promise is not applicable? *N.L.R.B.* v. *Knight Morley Corp.*, 251 F. 2d 753 (C.A. 6), cert. denied, 357 U.S. 927. (10) As in this case, does the agreement itself preclude the issuance of a strike injunction as a means of enforcing the no-strike promise (*infra*, pp. 66-67)?

It is to provide a federal forum for the decision of these and a host of like federal questions that Congress

has made removal available to a defendant.[17] Without

[17] The deceptiveness of the facile assumption that it is easy to decide whether a strike during the term of an agreement is in breach of contract is shown by the following excerpt from Major Collective Bargaining Agreements, Arbitration Procedures, Bull. No. 1425-6, Bur. Lab. Stat., U.S. Dept. Lab., 91 (June 1966):

Despite the widespread prevalence of grievance and arbitration procedures and no strike-lockout pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements:

How strikes May Occur During the Term of Agreements Without Violating the Agreements

(1,717 major agreements)

Strikes banned	Strikes possible
Absolute ban on strikes (757)	
Not all possible disputes subject to grievance and/or arbitration (594)	
No arbitration (9)	
All disputes subject to arbitration (154)	
Limited ban on strikes (780)	
All disputes subject to arbitration (64)	Strikes banned over disputes subject to arbitration but not all possible disputes subject to grievance and/or arbitration (285)
	Arbitration provided but strike ban waived if agreement violated (331)
	Arbitration required mutual consent (35)
	No arbitration (62)
	Other (3)
No ban on strikes (180)	
All disputes subject to arbitration (25)	Arbitration provided but not all possible disputes subject to grievance and/or arbitration (118)
	No arbitration (37)
Total agreements ..... (846)	..... (871)

removal these questions will be decided by state courts that may be inhospitable to or unaware of national labor policy. Federal law will be fashioned without the sustenance of federal courts and correction of state errors in the federal area will have to await the necessarily limited attention that this Court can devote to this burgeoning field. Removal is Congress' solution when the civil action begun in a state court is within the "original jurisdiction" of a federal district court and "founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1441(b). A § 301 action meets these two prerequisites and removal on the defendant's petition is therefore mandatory.[18]

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[18] *Sea-Land Service* v. *Hall*, 56 C.C.H. L.C. ¶ 12,263 (S.D. N.Y., November 6, 1967); *Oman Construction Co.* v. *Teamsters Local 327*, 263 F. Supp. 181 (M.D. Tenn.); *Katz* v. *Architectural & Engineering Guild*, 263 F. Supp. 222 (S.D. N.Y.); *Sealtest Foods Division* v. *Conrad*, 262 F. Supp. 623 (N.D.N.Y.); *Publishers' Assn.* v. *Printing Pressmen's Union*, 246 F. Supp. 293 (S.D.N.Y.); *Food Fair Stores* v. *Retail Clerks District Council*, 229 F. Supp. 123 (E.D. Pa.); *Tri-Boro Bagel Co.* v. *Teamsters Local 802*, 228 F. Supp. 720 (S.D.N.Y.); *H.A. Lott, Inc.* v. *Hoisting & Portable Engineers Local No. 450*, 222 F. Supp. 993 (S.D. Tex.); *Crestwood Dairy* v. *Kelley*, 222 F. Supp. 614 (E.D. N.Y.). And see, *Byrnes Express & Trucking Co.* v. *Drivers Local Union 816*, 56 CCH Lab. Cas. ¶ 12,307, p. 20,335 (E.D. N.Y., Nov. 27, 1967): ". . . [T]here appears to be no current authority for remanding a case such as this where both an injunction and damages are requested. Moreover, even if only an injunction has been sought, the heavy weight of authority is in favor of denying a remand and vacating the state restraining order."

See also, Aaron, *Strikes in Breach of Collective Bargaining Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027, 1040-1051 (1963); Notes, 51 Va. L. Rev. 973 (1965); 78 Harv. L. Rev. 1005 (1965); 22 Wash. & Lee L. Rev. 255 (1965); 60 Nw. U. L. Rev. 489 (1965); 38 Temp. L. Q. 361 (1965); 52 Cornell L. Q. 132 (1966); 14 UCLA L. Rev. 1130 (1967).

II. THE PROPOSITION THAT A STATE COURT IS EMPOWERED TO ISSUE A STRIKE INJUNCTION IN A § 301 ACTION IS IRRELEVANT TO REMOVAL AND ERRONEOUS

Resistance to removal stems exclusively from this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, that a federal court is precluded from issuing an injunction to restrain a strike over a grievance which is submissible to arbitration under a collective bargaining agreement. But displeasure with *Sinclair* has legally nothing to do with removal. Removal is mandatory on the defendant's petition if the "original jurisdiction" and "arising under" prerequisites are satisfied. They are in this case. Nothing else is relevant. The supposed availability of a strike injunction in a state court is beside the point. "The Federal court may . . . be obliged to deny an equitable remedy which the plaintiff might have secured in a state court." *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491, 498. The civil action does not on that account cease to satisfy the "original jurisdiction" and "arising under" requirements. Accordingly, "even if the Norris-LaGuardia Act is considered operative only as a restriction on exercises of the federal equity jurisdiction, so that the state courts are thought free to grant injunctions in labor cases otherwise and substantively governed by federal law, that difference in equity jurisprudence between the two systems is not a ground for denying the right to remove." *Crestwood Dairy* v. *Kelley*, 222 F. Supp. 614, 617 (E.D. N.Y.); *Publishers' Association* v. *Printing Pressmen's Union*, 246 F. Supp. 293, 296 (S.D. N.Y.).

Indeed, were it true that a state court had power to issue a strike injunction, it would fortify the re-

movability of the action. For the disparity in equitable remedies, and the consequent lack of uniformity, are "unhappy consequences" that "can be avoided by the removal of such cases to a federal court." [19] At any rate, for those who believe the strike injunction is a salutary sanction, the proper quarrel is with the *Sinclair* decision, not with the conclusion that the action is removable because the sole prerequisites for removal have been met. The rules of removal and federal question jurisdiction should not be disjointed because one or another consequence of the grant or denial of removal is thought to serve a good, bad, or indifferent social or economic end.

Nevertheless, since the proposition that a state court has power to issue a strike injunction in a § 301 action is at the forefront of petitioner's argument and provides the excitation but not the legal justification for denying removal (pet. br. pp. 10-32), we now treat with this irrelevant contention and show that it is erroneous. Petitioner's argument in favor of a strike injunction to enforce a no-strike promise is virtually a replica of the argument which was urged but did not prevail in *Sinclair*. We do not retrace *Sinclair*. It has been decided and we begin with it. Analysis "must accept that the decision has been ingested into the federal labor policy." [20] This means that there is no longer room for the view that "injunctions against peaceful strikes are necessary to make the arbitration process effective. . . . [W]hatever might be said about the merits of this argument, Congress has itself re-

[19] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 Colum. L. Rev. 1027, 1051 (1963).

[20] Aaron, *supra*, 63 Colum. L. Rev. at 1035.

jected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision." *Sinclair,* 370 U.S. at 213. Accordingly, given *Sinclair,* all that is properly left for decision is the question whether, although Congress determined that a strike injunction should not be grantable in a § 301 action in a federal court, it nevertheless concluded that the identical injunction should be grantable in an identical action in a state court. We now show that Congress did not legislate that idiosyncratic disparity.[21]

A. The Principle Which Governs § 301 Is Uniform Application of Paramount Federal Law

The desideratum of national labor policy is uniformity.[22] This is emphatically true of a § 301 action. "The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,* requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy. . . . [T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . [I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over incon-

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[21] *Independent Oil Workers* v. *Socony Mobil Oil Co.,* 85 N.J. Super. 453, 205 A. 2d 78.

[22] *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 241-243; *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 10-11.

sistent local rules." *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103, 104.[23]

Uniformity as the governing principle in a § 301 action fits the ideal of the evenhanded rule of law. Whether a state-created action is brought in a federal court via diversity, or a federally-created action is brought in a state court, the same bundle of rights should be identically defined and subject to essential similarity in the vivifying means of enforcing the claim or defense in one court as in another. In a state-created action the " 'nub of the policy . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result.' " *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204, quoting *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. And in the enforcement of a federal right in a state court, "only if the federal law controls can the federal Act be given that uniform application throughout the country essential to effectu-

[23] See also, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 657; *Smith* v. *Evening News Assn.*, 371 U.S. 195, 200. *Cf.*, *I.A.M.* v. *Central Airlines*, 372 U.S. 682, 692, observing that, as to a § 204 Railway Labor Act collective bargaining agreement, "The needs of the subject matter manifestly call for uniformity." The absorption of state statutes of limitation as the federal rule in a § 301 action reflects the unlikelihood that lack of uniformity in this minor sphere will "have substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights in the collective bargaining process" (*International Union, U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703, n. 4), the customary recourse to state statutes of limitations to govern the timeliness of federal actions in the absence of a specific congressional time-bar (*id.* at 703-704), and the consequent lack of need to bring to bear "a high degree of inventiveness from the courts" to the problem (*id.* at 701). *Hoosier Cardinal* is therefore not a retreat from the general desideratum of uniformity in the administration of § 301.

ate its purposes." *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361.[24] A federal court adjudicating a state right cannot "substantially affect the enforcement of the right given by the State." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. Neither can a state court substantially affect the enforcement of the right given by the United States.

B. The Availability of a Strike Injunction in a State Court in a § 301 Action Would Result in a Crazy Quilt Destructive of Uniformity

The availability of a strike injunction in a state court but not in a federal court in the enforcement of a § 301 claim is at war with uniformity. The disparity is not limited to state courts and federal courts vis-a-vis each other. It is emphasized by lack of uniformity among the state courts as well.[25] Strike injunctions are grantable in some state courts but not in others. According to the petition for a writ of

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[24] See also, *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 243-246; *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296, 298-299. "[W]hen federally-created rights are enforced in the state courts . . . the cardinal consideration is federal paramountcy. . . . Moreover, federal paramountcy extends as much to procedural as to substantive matters; if the federal purpose is clear, and if it is valid, there is no room for local procedural autonomy . . . and this is true whether the federal purpose is evidenced by an express Congressional enactment of a 'procedural' character or is reasonably inferable from the substantive federal right in issue." Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?* 17 Ohio St. L.J. 384, 387 (1956).

[25] ". . . [R]easonable uniformity is notably absent in state law. States currently differ as to procedure, substantive, common law, and statutory law on the subject." Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation Against Incompatibility*, 39 Temp. L. Rev. 65, 77 (1965).

certiorari (p. 19), strike injunctions to enforce a no-strike promise are unavailable in fourteen states.[26] Disparity in the enforcement of a federal right would thus exist not only between federal and state courts but from one state court to another. A multi-state strike would be enjoinable in one place but not another.

But the variegation does not stop even there. The identical claim arising from the same strike could be in issue before both a state court and a federal court. The employer might bring an action seeking a strike injunction in a state court and a separate action seeking damages in a federal court (*supra*, pp. 26-27). An employer might seek injunctive relief in a state court and the union might seek a declaratory judgment based on the same events in a federal court. *Merchants Refrigerating Co.* v. *Warehouse Union, Local 6,* 213 F. Supp. 177 (N.D. Cal.). Thus, conflicting adjudication is threatened as to the very same claim with resolution dependent upon the fortuity of which judgment is first "obtained in one court which may be set up as *res judicata* in the other."[27]

Accordingly, were the grant of a strike injunction allowable in a state court in a § 301 action, the ensuing disparity with which the system would be shot through would destroy uniformity.

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[26] *E.g., Tidewater Express Lines* v. *Freight Drivers & Helpers Union,* 230 Md. 450, 187 A. 2d 685.

[27] *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195.

C. Uniformity Is Essential With Respect to All Meaningful Aspects of a § 301 Action Whether "Substantive," "Procedural," or "Remedial"

Petitioner contends that the uniformity which this Court's decisions have stressed as essential in § 301 actions is limited to the principles pertinent to interpreting the content of the collective bargaining agreement and does not extend to other matters (Pet. br. pp. 13-15, 32). This foreshortened view seriously misreads the import of this Court's decisions. The principles which this Court has fashioned in the procedural and remedial areas are at least as significant in § 301 actions as the rules pertinent to the interpretation of the agreement, and uniformity is essential with respect to all meaningful aspects of a § 301 action whether denominated "substantive," "procedural," or "remedial."

Lincoln Mills itself requires specific performance of an executory promise to arbitrate. Obviously a state court is no longer free in a § 301 action to apply its common law rule that an executory promise to arbitrate is not enforceable. This Court holds that, while an individual employee has standing to maintain a § 301 action (*Smith* v. *Evening News Assn.*, 371 U.S. 195, 200-201), he may not do so if he has not attempted to exhaust the grievance and arbitration procedure (*Republic Steel Corp.* v. *Maddox*, 379 U.S. 650), and not even then unless the union has defaulted in the discharge of its duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171, 185-186). Obviously no state court is free inconsistently to hold that the individual employee has no standing, or that he need not attempt to exhaust the grievance and arbitration procedure, or that violation by the union of its duty of

fair representation is not a condition precedent to proceeding to judgment against the employer. A § 301 action is maintainable even though the promise to be enforced duplicates a command of the National Labor Relations Act (*Smith* v. *Evening News Assn.*, 371 U.S. 195), or the controversy is otherwise within the regulatory scope of that Act (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261), notwithstanding the customary exclusive jurisdiction of the National Labor Relations Board. Obviously no state court may inconsistently decline to entertain a § 301 action on the ground that an alternative remedy is available from the NLRB. This Court holds that procedural arbitrability is to be determined by the arbitrator. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 554-559. Obviously no state court can rule that it is for the court in a § 301 action. This Court has established the principle which governs the apportionment of damages when an employer has breached the collective bargaining agreement and the union has violated its duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171, 195-198. Obviously a state court in a § 301 action is not free to enforce a different remedial scheme.

Clearly, therefore, uniformity is essential whether the controlling rule at issue is formally classifiable as "substantive," "procedural," "remedial" or a blend. "In fact, since remedies form an ingredient of any integrated scheme of regulation" (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247), and procedural rules "themselves dig into 'substantive rights' " (*Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296), the procedure by which a right is realized and the remedy by which it is vindicated may well be more important than its substantive definition.

And that is plainly true of a strike injunction in a labor dispute. The fact is, "noted by all competent students of industrial relations, that in labor disputes the injunction remedy is inextricably linked with the rights of the parties involved; a strike may be won or lost, depending upon whether the employer's application for a temporary injunction or a temporary restraining order succeeds or fails . . . . Thus, to deny employers the injunctive remedy in Section 301 cases brought in federal courts, while permitting them to obtain that remedy in similar actions brought in state courts, would be to cause a marked disparity between the substantive rights of litigants under a law which purports to establish a common rule for all." [28] The "uniformity which the Court seeks is not a wooden uniformity of 'substantive' rather than 'remedial' law, but a uniformity meaningful in the light of the interests at stake. Such meaningful uniformity would be frustrated by a doctrine permitting either forum shopping for the purpose of securing an injunction in labor disputes or disparate results in the federal and state courts." [29] "Under the circumstances, distinguishing substantive and procedural law serves no useful purpose. Where so-called procedural law of the character embodied in the Norris-LaGuardia Act merges into, assumes the characteristics of, and becomes so much a part of substantive federal law and basic national policy that it cannot be rationally dis-

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[28] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 Colum. L. Rev. 1027, 1035-1036 (1963).

[29] Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II,* 59 Colum. L. Rev. 269, 279-280 (1959).

tinguished, the distinction should be discarded."[30] For "it is important that only one law and one scheme govern in the enforcement of collective agreements made in the federal arena. That is to prevent 'forum shopping' by parties looking for a break under one set of rules or another. To promote this policy the law must achieve the same results in both sets of courts, whether we call it substantive or remedial."[31]

D. The Norris-LaGuardia Act Expresses National Labor Policy Fully Applicable to the Adjudication of a § 301 Action in a State Court

Petitioner contends that the holding in *Sinclair* precluding the issuance of a strike injunction in a § 301 action stems solely from the Norris-LaGuardia Act applicable exclusively to federal courts, and that in a § 301 action in a state court "these inhibiting restraints are absent" (Pet. br. pp. 32, 10-11). But that is too crabbed an approach to the meaning of the Norris-LaGuardia Act. While in form a restriction upon the exercise of equity jurisdiction by the federal courts, "in the nation's social history few enactments can have been more emphatically substantive in impact than the Norris-LaGuardia Act." *Crestwood Dairy* v. *Kelley,* 222 F. Supp. 614, 617 (E.D. N.Y.). It is "a long-standing, carefully thought out and highly significant part of this country's labor legislation . . . and has been an important part of the pattern of legislation under which unions have functioned for nearly . . . [36]

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[30] Stern, *The Norris-LaGuardia Act and State Court Injunctions Against Strikes in Breach of a Collective Bargaining Agreement Under Section 301: Accommodation Against Incompatibility,* 39 Temp. L. Rev. 65, 78-79 (1965).

[31] Gregory, *The Law of the Collective Agreement,* 57 Mich. L. Rev. 635, 652-653 (1959).

years." *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 203 and n. 16. It expresses "national policy" and its equitable restrictions have substantive import. *United States* v. *Hutcheson,* 312 U.S. 219, 233-237. The public policy which it articulates and the bounds of a labor dispute which it marks were later incorporated in the National Labor Relations Act and continue to have full contemporary relevance (*supra,* p. 30). Indeed, but for the fear that it might founder under a now outmoded concept of substantive due process,[32] it is probable that its commands would have been written predominantly as positive declarations as well as equitable limitations.[33] Certain it is, therefore, that we must read the Norris-LaGuardia Act in its relationship to other law, not as a "tightly drawn amend-

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[32] *Ferguson* v. *Skrupa,* 372 U.S. 726.

[33] Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638, 648-649 (1932):

> More substantial from a legal point of view but of far less practical importance was the criticism of the law professors who believed that the injunction problem should be dealt with through changes in the substantive law. "The cure to be effective must go to the root, and not simply to the legal remedy." These critics wished to have written into the federal statutes positive declarations that both strikes and boycotts are lawful and urged that the conspiracy and other doctrines which are fundamental in the law of labor combinations should be specifically annihilated.
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> This approach was rejected not so much because of differences over social policies as from political considerations. While the overwhelming majority by which the Norris-LaGuardia bill was finally passed may be considered evidence that a much more radical bill would have also received congressional sanction, this seems very doubtful even now to all who have been in close touch with the situation. But really determining was the fear that any bill framed on such lines would be held unconstitutional.

ment to a technically phrased tax provision", but as a statute expressive of national labor policy. *United States* v. *Hutcheson,* 312 U.S. 219, 234-236.

That must be its reading even if the focus is entirely procedural. For the preliminary issuance of a strike injunction determines the outcome of a strike without regard to the ultimate determination that the strike was or was not substantively rightly enjoined. The drastic effect of the so-called temporary remedy practically moots the substantive question of the right to the relief. And this of course was a principal evil against which the Norris-LaGuardia Act was aimed. As has been explained (Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638, 653-654 (1932)):

> Strikes normally last only a short time, which makes the first action of the courts in labor injunction cases all but decisive in its effects upon the dispute. There is no way of measuring or compensating workmen for loss of a strike, which means that if an ex parte temporary restraining order is issued improvidently the injury to the defendants is truly irreparable.
>
> Ex parte temporary restraining orders constitute one of the outstanding abuses of injunctions in labor disputes. Very generally, these orders are drafted by the complainants' attorneys and signed by the judge without taking any testimony. Often they are found after a hearing to have been unwarranted or too broad in scope, but a modification, coming as it usually does months after the order was issued, is of little practical benefit to the defendants. In many cases there never is any hearing, as the strike is over before the appointed day.

Even if as "law interpreters" one were free to ask, as one is not,[34] whether the evil at which the Norris-LaGuardia Act is aimed has subsided, and whether the extirpation of that evil has lesser contemporary relevance as an expression of national labor policy than formerly, the answer would not be assuring. Judicial performance in this field remains unencouraging. See *I.L.A., Local 1291* v. *P.M.T.A.*, 36 U.S. Law Week 4001 (S. Ct., November 6, 1967). The consequence of a strike injunction remains determinative. "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of . . . [the enjoined party's] rights and render entirely illusory" any resort to eventual appeal. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 550; *Liner* v. *Jafco*, 375 U.S. 301, 308. And the evil which national labor policy does not tolerate in a federal court is as fully alive when a state court issues a strike injunction, as the recent study of an informed and disinterested commentator shows (Aaron, *Labor Injunctions In The State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-58 (1964)):

> It is only when we shift our focus from substantive to procedural considerations (never forgetting, however, how much the two overlap) that the policies of the various state laws we have reviewed seem especially vulnerable to attack. And, in shifting the focus, let us concede for purposes of argument that the various types of conduct now held to be enjoinable are properly considered to be unlawful. Does it necessarily follow that they should also be subject to injunction? I think not.

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[34] *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 214-215.

My reasons are based on the findings and observations in the previous section of this Article dealing with procedural requirements. Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse. An injunction is ordinarily issued on the assumption that someone is committing an unlawful act which threatens irreparable harm to someone else, and for which there is no adequate remedy at law. If those were indeed the facts in every case, the only arguments left to the opponents of the injunction would be those against the morality or legality of the statute or public policy which declared the actions enjoined to be unlawful—arguments which I eschew. But the facts of a typical labor dispute which reaches the litigation stage are usually tangled and unruly; as any arbitrator knows the conflicting statements and allegations of the parties in complicated cases must be carefully sifted and evaluated before one can be reasonably certain of arriving at even an approximation of the truth. Indeed, it often happens that after the most exhaustive exploration of a complex dispute, the arbitrator still entertains substantial doubts that he is in possession of all the relevant facts. In his effort to get at them, however, he is aided by a more informal procedure than that which prevails in the courtroom, and he can often pursue indirect lines of inquiry which past experience, or the offhand remarks or behavior of witnesses, indicate may prove fruitful. The arbitrator's proper concern, as Dean Harry Shulman used to say, is not that he may hear too much that is irrelevant, but that he may not hear enough that is relevant.

Consider the sharply contrasting position of a trial judge hearing an application for a temporary

restraining order. Frequently, as we have seen, he will entertain the application in an ex parte proceeding, possibly on the basis of affidavits and argument, without testimony. It is safe to assume that in most instances he will have only slight familiarity, if any, with industrial relations practice; and frequently, he will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case, and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently well informed about the case to reach a reasonable judgment concerning the need for a restraining order.

If the case should subsequently go to a hearing on a motion for a preliminary injunction, the judge will take testimony, but the hearing will be subject to all the other handicaps mentioned above. In addition, though the rules of evidence will, perhaps, prevent the court from hearing much that is irrelevant, they will also practically always assure that he will not hear enough that is relevant.

There is also another factor to consider. The study of injunctions in Los Angeles County showed a strong tendency on the part of judges who had granted temporary restraining orders not only to refuse modifications of such orders, but also to grant subsequent motions for preliminary injunctions in the same cases. This suggests that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves.

It seems more than likely, therefore, that many temporary restraining orders and preliminary injunctions are improperly issued, not because the

> judge is prejudiced, but because he is insufficiently informed. Sometimes the result is inconsequential to either party; in the case of certain deep-seated disputes, the judicial restraint of some outward manifestations of protest may intensify the conflict and delay the ultimate solution, but it will not destroy the defendant's position. In a great many, if not the majority, of cases, however, the restraining order or preliminary injunction spells defeat for the defendant's cause. Every objective study of injunctions in action since the publication of the pioneer work by Frankfurter and Greene has noted this result. Such a result is wrong, not because we can be sure that the defendant's cause is just and its objectives lawful—they frequently are not—but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute.

The national labor policy which exorcises this evil in a federal court does not allow its manifestation in a state court in a § 301 action. And that the evil distinctly exists in a § 301 action in a state court is patent. The strike injunction in *American Dredging* was issued *ex parte*. 224 F. Supp. 985, 987. So was the strike injunction in this case (R. 9-10). The strike occurred, the complaint was prepared and presented, and the injunction was issued, all in a single day, all without notice to the Union, all without hearing one word of argument from the Union, and all in complete accord with state procedure. This issuance of an *ex parte* strike injunction in a § 301 action in a state court is typical.[35] And this typical practice is the reason that

[35] For examples of such state action noted in removed cases, see *Sealtest Food Div.* v. *Conrad*, 262 F. Supp. 623, 624 (N.D.N.Y.); *Food Fair Stores* v. *Retail Clerks District Council*, 229 F. Supp. 123, 125, 128 (E.D. Pa.); *Castle & Cooke Terminals* v. *Local 137, Longshoremen*, 110 F. Supp. 247, 248 (D. Haw.).

Congress came to the view that the "injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined...." S. Rep. No. 163, 72d Cong., 1st Sess., 8.[35a]

"The nature of this procedure runs contrary to protecting 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.'" *Food Fair Stores* v. *Retail Clerks District Council,* 229 F. Supp. 123, 128 (E.D. Pa.). Affirmation of this right of concerted activity is part of the public policy of the United States declared by section 2 of the Norris-LaGuardia Act (*Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195, 202), and the guarantee of this right is explicitly mandated by section 7 of the National Labor Relations Act. An injunction which restrains a strike in reliance on the erroneous claim that it is in breach of a no-strike promise may irremediably defeat recourse to protected concert vouchsafed by the Norris-LaGuardia Act and the National Labor Relations Act. This detrimental consequence is a principal part of the mischief against which the Norris-LaGuardia Act guards. It is no less a mischief when wrought by a state court injunction than by a federal court injunction. Accordingly, when a state court is called upon

[35a] In a nonlabor context, relying upon "the important considerations that led to the enactment of the Norris LaGuardia Act," Mr. Justice Frankfurter criticized the grant of temporary relief without hearing oral testimony. Concurring in *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 297-298.

to enforce a federal right, it is bound by the principle that "The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions." *I.A.M.* v. *Street,* 367 U.S. 740, 772. And so, when the crux of the action is the claimed enforcement of a federal right, a state court is not empowered to do what a federal court is debarred from doing.

"To sum up, the Supreme Court took a road in the *Sinclair* case from which it cannot turn back without repudiating the basis of that decision. Having read Section 4 of the Norris-LaGuardia Act into Section 301 of the Taft-Hartley Act, it should now rule that state courts enforcing rights arising under that section are prohibited from granting injunctions against strikes allegedly in violation of collective agreements. In so doing it would not be applying the jurisdictional limitations of the Norris-LaGuardia Act to the state courts; rather it would be applying the federal common law of Section 301."[36] ". . . [B]reach of contract strikes are not enjoinable in any court, state or federal, not because the Norris-LaGuardia Act applies to state courts, but because that Act defines federal policy with respect to the enforcement of federal labor contracts."[37] "To the federal statute and policy, conflicting state law and policy must yield." *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U.S. 173, 176. See also, *Local 20, Teamsters* v. *Morton,* 377 U.S. 252, 261; *Liner* v. *Jafco,* 375 U.S. 301, 308-309.

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[36] Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions,* 63 Colum. L. Rev. 1027, 1039 (1963).

[37] Ratner, *The Emergent Role of District Courts in National Labor Policy,* 17 Lab. L.J. 36, 43 (1966).

E. The Crux of the Matter Is That Preclusion of a Strike Injunction in a § 301 Action as a Matter of Federal Law Controls in a State Court Enforcing a Federal Right

The crux of the matter was exposed by Justice Carter in dissent in *McCarroll* v. *Los Angeles District Council*, 49 Cal. 2d 45, 315 P. 2d 322, 336, cert. denied, 355 U.S. 932: "The rights under the bargaining agreement being controlled by federal law, that law must also measure the remedies available for otherwise the federal law is not being applied. . . .[The injunction as] a remedy is more than mere procedure. It goes to the very essence of the right itself. . . . This is especially true in injunctions in labor disputes, such as an injunction against a strike. The case is usually won or lost at the preliminary injunction stage, even before the hearing on the application for a permanent injunction—the final judgment. . . . [T]he right not to be enjoined under the Norris-LaGuardia Act is a part of the federal right—a part and parcel of the rights which may be exercised with reference to bargaining agreements. Certainly a state court cannot give more relief (in fact, relief which will end the case) than a federal court when administering federal law. If it may, the requirement that the federal law be applied may well dwindle to nothing and there will be no uniformity as is sought by the federal Act in labor relations affecting interstate commerce. The right will be no greater than the remedy afforded for its protection which may vary from state to state. If as in *Brown* v. *Western R. of Alabama*, . . . 338 U.S. 294, the mere matter of state rules of pleading may not control in the enforcement of a federal law by a state court, then certainly the important and fundamental matter of allowing an injunction under state law cannot stand if the federal law forbids it." 315 P. 2d at 336, 338-339.

F. Sinclair Decided That Congress Rejected the View That a Strike Injunction Was Necessary To Make the Arbitration Process Effective; If the Question Were Still Open, the Need for a Strike Injunction Is Highly Problematical; and Any Problem Which Is Thought To Exist Is for Congress

Petitioner's pervasive theme is that Congress, in enacting § 301 to strengthen the enforcement of collective bargaining agreements, could not have meant to weaken existing remedial authority by disallowing the issuance of strike injunctions by state courts to enjoin strikes in breach of no-strike promises. But that argument founders because it is based on the *assumption* that Congress thought that the availability of a strike injunction was necessary to the efficacious enforcement of a no-strike promise. If that assumption were sound, *Sinclair* would have been decided the other way, for Congress surely did not intend the anomaly of effective enforcement of a federal right in a state court but enfeebled enforcement in a federal court. When Congress refused to lift the restrictions imposed by the Norris-LaGuardia Act on the issuance of a strike injunction by a federal court, it expressed its judgment that this form of relief was not necessary in a § 301 action and that any good it might promote was overbalanced by the harm it might cause. This judgment is as fully applicable to a state court as to a federal court in the adjudication of a § 301 claim. Given *Sinclair,* and its conclusion that Congress rejected the argument that "injunctions against peaceful strikes are necessary to make the arbitration process effective" (370 U.S. at 213), there is no room for the identical argument just because the § 301 action is brought in a state court rather than a federal court. Accordingly, petitioner's quarrel is in reality with the decision in

Sinclair. Acceptance of *Sinclair* as the law "really puts an end to the problem."[38]

Furthermore, were the issue still open, it is hardly datum, despite the fervent asseveration of the proposition by petitioner, that a strike injunction is important to secure performance of a no-strike promise. While certainly vexing in the individual situation in which it may occur, the overall incidence of strikes over grievances submissible to arbitration is doubtless quite small. In perspective we therefore deal with a fairly minor matter.[39] Furthermore, insofar as legal sanc-

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[38] Aaron, *supra*, 63 Colum. L. Rev. at 1035. Section 301 has of course accomplished the purpose for which Congress fashioned it. It has made a federal forum available unrestricted by antiquated niceties as to the suability of a union as a legal entity and unhampered by unrealistic service of process requirements. It has strengthened the enforcement of agreements by cleanly and unequivocally divorcing inquiry into the merits of the dispute (the arbitrator's function) from the question whether the parties had promised to submit the dispute to arbitration (the court's function) (*Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564); and by shielding the arbitration award from judicial displacement based on a court's disagreement with the arbitrator's determination of the merits (*Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593). And it has in other ways, substantively, procedurally, and remedially, made it possible to formulate a realistic law governing the administration of agreements. It has not provided for a strike injunction, but for many that is a virtue, not a weakness.

[39] The reports cited at p. 4, n. 6, of the amicus brief of Labor Relations Committee are uninformative. The reports give the incidence of strikes "During term of agreement," but do not say whether or not the particular agreement authorized strike action during the term, and therefore do not reveal whether or not the strikes violated the agreements. "Despite the widespread prevalence of grievance and arbitration procedures and no-strike pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements." Major Collec-

tions promote performance of the no-strike promise, the employer is free to discharge or discipline the strikers and their leaders,[40] a hardly inconsiderable deterrent to unauthorized strike action. In addition, a suit may be brought against the union to recover the damages caused by an illegal strike which it authorized. Unions are as little enchanted as any other institutions by the risk of a damage judgment which may empty or deplete their treasuries, and those who believe that exposure to a damage judgment does not operate as a significant deterrent have little experience with the decision-making process on the union side. Moreover, as most strikes in breach of a no-strike promise are wildcat in character and therefore unauthorized by the union, and which the union is already doing its best to stop, a strike injunction directed to the union adds nothing to its efforts to bring the strike to an end, and

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tive Bargaining Agreements, Arbitration Procedures, Bull. No. 1425-6, Bur. Lab. Stat., U.S. Dept. Lab., 91 (June 1966). Thus, the 1964-1967 GM-UAW agreement excepted from the no-strike promise any dispute over "production standards." CCH Labor Law Reporter, Union Contracts, ¶ 59,905, pp. 85,039 (§ .19), 85,047-08 (§§ .28, .29), 85,061 (§§ .59, .60). The reports cited in the amicus brief do show that, on any hypothesis, the incidence of contract-violation strikes during the term of the agreement is tiny. The report for the year 1965 is typical. As a percentage of total working time, the man-days idle during 1965 as a result of *all* stoppages came to .18 percent (p. 9), and of the total stoppages, the man-days idle as a result of stoppages *during the term of the agreement* came to 11.6 percent (p. 11). Accordingly, in relation to total working time, the man-days idle because of strikes during the contract term came to .021 percent, which must be further reduced by an unknown fraction to determine the incidence of strikes in violation of the agreement. Thus, in overall economic terms, in relation to total working time, the incidence of breach-of-contract strikes is necessarily trifling.

[40] *E.g., Modiglass Fibers Division*, 49 L.A. 697, sustaining the discharge of 58 breach-of-contract strikers.

a strike injunction directed to the men requiring them to return to work against their will is of doubtful constitutional validity [41] and of uncertain practical use.

Indeed, the agreement in this very case appears to be based on the premise that the means available to enforce the no-strike promise are limited to reliance on the Union's efforts to put an end to wildcat stoppages, to recovery of damages from the Union only if it defaults in performing that promise or is itself responsible for the stoppage, and to the discharge and discipline of breach-of-contract strikers. Article XIII of the argument provides that: [42]

> During the life of this Agreement, no work stoppages, strikes, or slow downs shall be caused or sanctioned by the Union and no lockouts shall be made by the Company.
>
> The Union shall not be liable to the Company in any action at law for damages arising out of any interruption of the Company's operations which is in violation of any provision of this Agreement, if such interruption is neither instigated, authorized, sanctioned, ratified, nor supported by the Union; provided that it immediately takes all available steps to remedy the violation. If the foregoing conditions are complied with, the exclusive remedy of the Company for such violation shall be that any employee who engages in any violation shall be subject to immediate discharge or discipline by the Company.

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[41] *Cf., International Union, U.A.W.* v. *W.E.R.B.*, 336 U.S. 245, 251.

[42] The agreement was attached to the complaint (R. 5); the first paragraph of Article XIII is quoted in the complaint (R. 8); the second paragraph is not, nor is it elsewhere printed in the Appendix.

While not expressed in so many words, it is strongly arguable that a strike injunction is precluded by the terms and tenor of the agreement. An "action at law for damages" is the specified remedy if the Union "instigated, authorized, sanctioned, ratified," or "supported" the stoppage. If it is a wildcat stoppage the Union fulfills its obligation if "it immediately takes all available steps to remedy the violation." And if the Union complies with these conditions the Company's "exclusive remedy" "shall be" discharge or discipline of the strikers. This is the enforcement means that the parties themselves adopted. Their specification of this remedy ordinarily excludes any other. And the exclusion of a strike injunction mirrors the normal expectation in the administration of an agreement.

To the probable needlessness and inefficacy of a strike injunction as a sanction there must also be added the known abuse to which the strike injunction has been and will be put however abstractly just the cause in which it is enlisted. We need not go beyond this case to illustrate the vice. An *ex parte* injunction issued forthwith upon the filing of the complaint (R. 10), with no notice or opportunity to be heard extended to the defendants. The allegations of the complaint were accepted at face value, with no supporting showing other than a conclusory verification by the affiant that "he has read the foregoing bill, and that the allegations thereof are true except those made on information and belief, and these he believes to be true" (R. 10). Also accepted on faith was the complaint's representation that "Each and every alleged grievance above described should have been handled under the grievance procedure outlined in the collective bargaining agreement, and each suspension of work was in violation thereof" (R. 7-8). The *ex parte* injunction that issued ran not

only to the Union and its agents, but to all members as well, and it ran to them not only when acting in concert, but also when acting individually (R. 9).[43] The injunction was not limited to a suspension of work over matters submissible to the grievance and arbitration procedure. Nor was the injunction limited to a suspension of work, but extended to "any interruption of operations," and any interference with the "normal conduct" of business for the duration of the agreement (R. 9).[44]

[43] Contrast the requirement of section 7(a) of the Norris-LaGuardia Act that "no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." Contrast as well the requirement of Rule 65(d) of the Federal Rules of Civil Procedure that an injunctive order "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." "The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co.* v. *N.L.R.B.*, 324 U.S. 9, 13.

[44] Contrast the observation of Mr. Justice Brennan in dissent in *Sinclair*, 370 U.S. at 225: "But there is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy [like that favoring agreed arbitration], in such cases the anti-injunction policy of Norris-LaGuardia should prevail." And see *id.* at 228-229. Exemplified by this case, however, the unfortunate fact is that judicial circumspection in the issuance of strike injunctions rarely exists. Contrast also the injunction issued in this case with the limitations expressed in the bills introduced to modify the *Sinclair* rule, *infra*, p. 71, n. 49. In these bills a strike injunction is grantable in a § 301 action only if the agreement provides for "binding arbitration of any claim" of contract violation asserted by the union, and if the agreement further "expressly" provides that the limitations of the Norris-LaGuardia Act shall not apply.

Accordingly, the consequence of an injunction like that issued in this case would be that for the duration of the agreement its administration would be overhung by an omnipresent judicial decree with two thousand workers citable for contempt for its alleged violation. To say that this is an unprecedented and disquieting method of contract administration is to say the least. A strike injunction, whether pervasive or particularized, is alien to the true source of the viability of the grievance-arbitration and no-strike promises. The fact is that the system of agreed submission of grievances to arbitration and the concomitant adherence to a no-strike promise is not dependent on the availability of legal sanctions to make it work and is not repairable by legal sanctions if it does not work.[45] Despite the legal underpinnings provided by § 301, adjustment of contract claims through the grievance and arbitration procedure without strikes is essentially an autonomous system of self-government which draws its sustenance from the self-determined commitment of the parties to it. Viewed in this light the availability of a strike injunction is almost an irrelevancy. For "unions have a heavy stake in the orderly administration of collective agreements, and in the vitality of the arbitral process as an alternative to strikes. They want to utilize arbitration, not to sabotage it. In discussing the pathological situations where legal niceties regarding Norris-LaGuardia engage our attention, we should never forget that in most healthy situations the arbitration process will be invoked, and its result accepted, without a thought of strike action." [46]

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[45] Shulman, *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 262, 286-287 (1955).

[46] St. Antoine, *Comments,* 14 Lab. L.J. 362, 364 (1963).

All this suggests that the problem, if one exists, and a solution, if one is desired, is for Congress. When petitioner reminds, as it does (br. pp. 18-19), that "labor legislation is peculiarly the product of legislative compromise of strongly held views" (*N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179), the lesson to be learned, as this Court taught in *Sinclair,* is that the matter "is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters" (370 U.S. at 215). Whether a strike injunction should be part of the judicial arsenal in a § 301 action, and the terms upon which it should be made available if it should be added, are issues which engage competing considerations whose resolution is quite unclear on the intellectual level and which are highly divisive and emotional on the partisan level.[47] And so what petitioner asks of this Court should be sought of Congress. "The principal consideration here rests on the proposition that resolution of contested issues touching upon sensitive areas of our social and economic life should be made by the electorally based and therefore responsive political institutions."[48]

This consideration is even more impelling now than when *Sinclair* was decided. It has been five and one-half years since that decision. Congress has not been persuaded to change the *Sinclair* rule. It has not acted

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[47] Proceedings of the Section of Labor Relations Law, Part II, American Bar Association, August 12-14, 1963, 41-54, 226-244.

[48] Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair* v. *Atkinson,* 72 Yale L.J. 1546, 1563 (1963).

on bills designed to modify it.[49] When legislators are content to leave well enough alone judges should be slow to respond to a controversial claim of what the common-weal supposedly requires. Congress sits as well as this Court.

CONCLUSION

A § 301 action brought in a state court is within the "original jurisdiction" of a federal district court "*arising under*" *a law of the United States.* Removal is therefore mandatory upon the defendant's petition without more. The unavailability of a strike injunction in a federal court in a § 301 action when the suit

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[49] S. 2132, 89th Cong., 1st Sess., June 14, 1965, introduced by Senator Javits, and H.R. 9059, 89th Cong., 1st Sess., June 15, 1965, introduced by Congressman Reid, provided that "section 301 of the Labor-Management Relations Act, 1947, is amended by adding the following new subsection:

> "(f) The provisions of the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (29 U.S.C. 101-115), shall be inapplicable in any proceeding to enjoin the violation of, or to enforce an arbitration award arising out of an alleged violation of, a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, if the contract includes (i) a provision for submission to binding arbitration of any claim asserted by such labor organization alleging a violation of such contract by such employer, and (ii) a provision expressly stating that the provisions of such Act approved March 23, 1932, shall be inapplicable in any such proceeding."

It should be noted that under these bills the inapplicability of the Norris-LaGuardia Act is dependent upon (1) a provision in the agreement for "binding arbitration" of any claim of contract violation asserted by the union, and (2) a provision in the agreement "expressly stating" that the limitations of the Norris-LaGuardia Act are not to apply.

is removed, and the supposed availability of a strike injunction in a state court in a § 301 action if the suit is not removed, are each irrelevant to removal. This case, accordingly, presents no question as to whether a state court is empowered to issue a strike injunction in a § 301 action. But if that question is reached, the answer is clear that a state court, like a federal court, is precluded as a matter of federal law from issuing a strike injunction in a § 301 action. The judgment should therefore be affirmed.

Respectfully submitted,

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APPENDIX

Norris-LaGuardia Act (47 Stat. 70. 29 U.S.C. § 101)

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for

the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State.

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified.

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy be-

cause of the doing in concert of the acts enumerated in section 4 of this Act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof.

(b) That substantial and irreparable injury to complainant's property will follow.

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the juris-

diction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

SEC. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined) the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or

more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this Act or the application thereof to any person or circumstances is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

SEC. 15. All Acts and Parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved March 23, 1932.

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NO. 445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AVCO CORPORATION,
Petitioner
v.
AERO LODGE NO. 735; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred and twenty-nine national and international unions having a total membership of approximately fourteen million, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

A CIVIL ACTION BASED ON THE CLAIM THAT A UNION HAS BREACHED A NO-STRIKE CLAUSE IS REMOVABLE TO THE UNITED STATES DISTRICT COURTS WITHOUT REGARD TO THE REMEDY SOUGHT SINCE THE CLAIM ARISES UNDER FEDERAL LAW AND THE SUIT IS WITHIN THE DISTRICT COURTS' ORIGINAL JURISDICTION

In *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962) this Court recognized that the language and legislative history of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), demonstrate that Congress intended the federal law of collective bargaining agreements to include, as one of its elements, Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 *et seq.* (1958) and therefore held that injunctions to enjoin strikes alleged to be in breach of contract, and alleged also to be over a grievance subject to binding arbitration, may not be issued in the federal courts. *See also Teamsters Local 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962).

The instant case arose when the Petitioner, whose operations affect commerce, brought an action, in a State Court in Tennessee, in which it alleged that the Union representing the employees at its Nashville plant had breached the clause in the applicable collective bargaining agreement stating that the Union would not "cause or sanction . . . work stoppages, strikes, or slowdowns." The Union removed the case to the applicable United States District Court pursuant to 28 U.S.C. § 1441(b) which states:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising

> under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

The Petitioner then moved to have the case remanded. This motion was denied and on appeal the Sixth Circuit affirmed the District Court's refusal to remand.

It is, of course, fair to say that the consequences of the decision in *Sinclair* provide the impetus behind this case: If that decision had gone the other way, even the tenuous rationale the Petitioner has constructed to contest removal here would not be available. Moreover, if prior to the instant case this Court had reached the question of whether the *Sinclair* rule applied in Section 301 cases brought in state courts, and had held that it did, it is probable that the proper interpretation of the removal statute would not have become a fighting issue. Nevertheless, we submit that the instant case is not a labor law case in the same sense as *Sinclair*. For *Sinclair* turned on the meaning and interrelationship of two statutes directed solely to labor relations; the instant case on the other hand, while it is contained in the matrix formed by the same statutes, turns on general neutral principles of federal jurisdiction and not on the distinct considerations upon which federal labor policy has been constructed.[1] The application of these principles, as we shall now show, leads to one conclusion, and one conclusion only—that every action based on a claim that a union has breached a no-strike clause in a collective bargaining agreement covering employees engaged in an industry affecting commerce arises under the laws of the United States and is within the original jurisdiction of the United States District Courts. All such actions are therefore removable to the federal district courts.

1. We start from the general proposition that all civil

[1] Norris-LaGuardia is not the only statute which limits the issuance of injunctions by the federal district courts, *see e.g.*, 28 U.S.C. § 2283.

actions whose essence is that there has been a breach of a collective bargaining agreement fall within the overall original federal question jurisdiction of the federal district courts. That is the holding of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957):

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws . . . Federal interpretation of the federal law will govern, not state law. Cf. Jerome v. United States, 318 U.S. 101, 104. Any state law applied . . . will be absorbed as federal law and will not be an independent source of private rights.
>
> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 367. Congress has indicated by § 301(a) the purpose to follow that course here. There is no constitutional difficulty. Article 3, § 2 extends the judicial power to cases "arising under . . . the Laws of the United States . . ." The power of Congress to relate these labor-management controversies under the Commerce Clause is plain. Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342. A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article 3."

Second, it is equally clear that an action, based on a claim that a union has breached a no-strike clause, in which both damages and an injunction are sought, is not removed from the cognizance of the federal district courts by *Sinclair*. That is the holding of *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the second of the two decisions this Court rendered in the *Sinclair* litigation. That litigation started in the district court as a single civil action based on a complaint in which both of these remedies were sought. And while the *Sinclair* decision held that the injunctive remedy was not available in the federal courts, in the *Atkinson*

decision this Court concluded that the district court could properly enter a judgment awarding damages.

Third, as *Atkinson* illustrates, the original jurisdiction of the federal courts turns on the nature of the *basic claim* advanced by the plaintiff; it does not turn on the type of relief available or on the disposition of a particular complaint on the merits. Thus original jurisdiction is present if the federal court is competent to act in the general area delineated by the basic claim made by the plaintiff:

> "Frequently the term 'jurisdiction' is loosely used to mean that under the facts of the case a party is not entitled to prevail, and thus, so it is argued, the court lacks power—or 'jurisdiction'—to grant the relief sought. Such usage is incorrect, and leads only to confusion. The jurisdiction of the federal courts is dependent on the subject matter of the action or the status of the parties to it; it is not dependent on the merits of the case." 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed., 1960) § 21, p. 85.[2]

As this Court explained in *Montana-Dakota Utility Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951):

> "The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that

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[2] In the instant case there are no jurisdictional problems based on the nature of the parties. Therefore throughout our argument we use "original jurisdiction" and "subject matter jurisdiction" interchangeably.

is attacked as unconstitutionally broad and the federal court has jurisdiction of the cause. But *Zwickler* does not hold that a federal court should become involved in a state case where the federal court lacks jurisdiction of the cause.

(2) The *Amicus Curiae* erroneously states, at page 9, that the Congressional purpose evinced by the removal statutes,

> ". . . is clearly to insure that no federal question case is tried in a state court *unless both parties wish to have it tried there.* The removal statute provides the insurance necessary to vindicate the primary position of the federal courts in federal question litigation." (Amicus br., p. 9; emphasis in original)

As this Court knows, no action involving less than $10,000.00, founded on a claim arising under a federal statute is removable no matter how important the federal question unless Congress by specific enactment has waived the jurisdictional amount. Both the plaintiff and the defendant, therefore, are compelled to try such a case in a state court.[35] So the remarks of the *Amicus* about "both parties", and about vindicating "the primary position of the federal courts in federal question litigation" are nonsense.

On the contrary ". . . the general policy of [the removal sections], manifest upon their face, and often recognized by this court, [was] to contract the jurisdiction of the [federal courts]." *Tennessee* v. *Union & Planters' Bank* (1894) 152 U.S. 454, 462, 38 L. Ed. 511. Accord: *Shamrock Oil & Gas Corp.* v. *Sheets* (1941) 313 U.S. 100, 85 L. Ed. 1214 (cited on pp. 33-34 of Petitioner's principal brief). "It is said that the trend of the decisions is to restrict and limit the removal jurisdiction of the federal courts. Certainly there is ample case support of the propo-

[35] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 508, n. 4, 7 L. Ed. 2d 483.

sition that removal statutes will be strictly construed." 1 Barron & Holtzoff, Federal Practice and Procedure (1960 Ed.) Section 101 at p. 460.

A fair construction of the statutes involved would not allow subversion of Congressional intent manifested in 1947 to make "no change in the existing anti-injunction provisions . . ." [36] and to "supplement, the thoroughly considered jurisdiction of the various states over contracts made by labor organizations." [37]

CONCLUSION

The Respondents have argued that, "Resistance to removal stems exclusively from this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 . . ." (Resp. br., pp. 11, 44) They should have drawn a line through the first two words. But for *Sinclair*, there is little reason to believe that the Respondents would have attempted the removal. And if they had not done so, this Petitioner would have had nothing to "resist." But this Court's decision in *Sinclair* has been misread by the Respondents. Actually, *Sinclair* is a holding in favor of the Petitioner's contention, because the Court there construed Norris-LaGuardia literally. As so construed, the Act necessarily applies only to federal courts. It has not applied in the past, and in the absence of amendment, cannot apply in the present or future to state courts. Also, construing "jurisdiction" literally closes the door of federal courts to removal of state court suits seeking injunctive relief against strikes in breach of contract.

For the reasons set forth above, and in its main brief, the Petitioner submits that state courts retain their his-

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[36] Sinclair Refining Co. v. Atkinson, *supra* (1962) 370 U.S. 195, 207, 8 L. Ed. 2d 440.

[37] Dowd Box, *supra* (1962) 368 U.S. at 511.

toric jurisdiction to enjoin strikes in breach of contract, that a civil action filed in a state Chancery Court seeking such relief is not founded on a claim or right arising under the Constitution or laws of the United States, and that it is not an action "of which the district courts have original jurisdiction."

Injunctions are the only effective remedy against "wildcat" strikes in breach of contract. Their availability to management strengthens the hand of responsible union leaders who want to keep contract promises and maintain labor peace during the contract term. In this era of economic interdependence, the continued availability of this form of specific performance is essential for the protection of employers, responsible employees, and the consuming public. Without injunctive relief whole cities can be paralyzed. Certainly our system of compulsory collective bargaining assumes and requires full performance of collective agreements. Only state court injunctive relief can assure such performance.

The judgment of the court below should be reversed and the cause should be remanded with directions to reverse the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, reinstate the injunction improvidently dissolved by that court, and remand the cause to the Chancery Court for Davidson County, Tennessee, from which it was removed by the Respondents. The Petitioner also prays that it have its costs expended herein.

Respectfully submitted,

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SUPPLEMENT TO APPENDIX A

Statutes Involved

Section 10 of the Labor Management Relations Act, 1947 (29 U.S.C. § 160 (1964), 61 Stat. 146) provides in pertinent part:

§ 10. Prevention of unfair labor practices.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That

no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

* * * * *

Section 5 of the Conformity Act of 1872 (Act of June 1, 1872, ch. 255, 17 Stat. 197) provides:

* * * * *

Sec. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in

like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

* * * *

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MAY 3 1968

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PETITION FOR REHEARING

The Petitioner, Avco Corporation, respectfully prays that this Court grant rehearing of its decision issued April 8, 1968, affirming a decision of the United States Court of Appeals for the Sixth Circuit.

As its reasons for granting rehearing, the Petitioner states as follows:

1. In footnote 4 of the majority opinion, the Court stated that:

> "Another question raised here is whether the District Court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee

state court. There is, of course, no question of the power of the District Court to dissolve the injunction. See 28 U.S.C. § 1450. *Whether it did so because it felt that action was required by Sinclair Refining Co. v. Atkinson, 370 U.S. 195, or because of its equity powers or both is not clear. But the Court of Appeals went much further and said in a dictum that 'the remedies available in State Courts are limited to the remedies available under Federal law.'* 376 F. 2d, at 343. We reserve decision on *those questions.*" (Emphasis added)

Likewise, the concurring Justices stated that:

"As the Court says, *it is not clear whether or not the District Judge dissolved the injunction 'because it felt that action was required by Sinclair Refining Co. v. Atkinson, 370 U.S. 195,' ante, at ..., n. 4. Accordingly, the Court expressly reserves decision on the effect of Sinclair in the circumstances presented by this case.* The Court will, no doubt, have an opportunity to *reconsider the scope and continuing validity of Sinclair upon an appropriate future occasion.*" (Emphasis added)

It is respectfully submitted that the statement that it is "not clear" whether the District Court dissolved the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*" is factually erroneous. A review of the motion to dissolve and the order of the District Court dated March 2, 1966 discloses that it is, in fact, clear that the District Court dissolved the injunction because it felt that such action was required by *Sinclair* and by the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. 101, et seq. (1964), which *Sinclair* construed and applied. The District Court accepted the Respondents' contention that the state court injunction was invalid and could not be "maintained" after removal. But for Norris-LaGuardia and *Sinclair*, there was no reason to dissolve the injunction and it would not have been dissolved, even

though remand was denied. These facts are evident from the language employed by the District Court in the March 2, 1966 order.

The motion which the District Court granted prayed for dissolution of the state court injunction and dismissal of the case,

> ". . . on the following grounds:
>
> "1. The complaint shows on its face that it involves and grows out of a labor dispute, that the temporary injunction sought and granted enjoins the acts enumerated in 29 U.S.C. § 104, or some of them, and *because this Court is denied the power to issue and maintain such injunctions by the provisions of 29 U.S.C. § 101 and 104.*
>
> "2. Because the complaint shows on its face that it involves and grows out of a labor dispute, *because the temporary injunction issued enjoins acts described in U.S.C. § 104, and because the said temporary injunction, issued by a 'Court of the United States' as defined by 29 U.S.C. § 113(d) is illegal.*" (A. 13; emphasis added)

In the order of March 2, 1966 (A. 17-22), the District Court first denied the Petitioner's motion to remand (A. 14), stating in part as its reasons:

> "*The Norris-LaGuardia Act withdraws jurisdiction from the federal courts to enjoin a peaceful strike growing out of a labor dispute, even when the strike violates the terms of a collective bargaining contract. Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).* But the mere fact that *a prohibited labor injunction is among the remedies sought* does not mean that a district court lacks original jurisdiction over the cause of action for the purpose of awarding other relief. Thus, in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), the inclusion in the complaint of a prayer for *a prohibited labor injunction*, together with a prayer for damages, did not prevent the Supreme

> Court from remanding the case to the district court for the purpose of determining whether damages should be awarded. It is clear on the authority of *Atkinson*, therefore, that a prayer for *a prohibited injunction* does not preclude a district court from exercising original jurisdiction, at least if non-injunctive relief is also sought." (Emphasis added)

The underlined portions of the above quotation make it clear that the District Court was holding that under Norris-LaGuardia, as construed by this Court in *Sinclair*, the Federal Court had no jurisdiction, under any circumstances, to enjoin a peaceful strike in breach of contract and that the Petitioner, therefore, had sought "a prohibited injunction"—prohibited, that is, by Norris-LaGuardia and *Sinclair*. The District Court further held that under *Atkinson* v. *Sinclair Refining Co.* (1962), 370 U.S. 238, which was a companion case to *Sinclair*, the District Court had jurisdiction of the cause despite the fact that there was no power to grant the injunctive relief sought by the Petitioner. Accordingly, the District Court denied the Petitioner's motion to remand.

In a subsequent portion of its order of March 2, 1966, the District Court addressed itself to the Respondents' motion to dissolve the state court injunction then in effect. The Petitioner respectfully submits that it is the following paragraph of the order of March 2, 1966, which makes it clear that the District Court dissolved the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*."[1] The District Judge, at the conclusion of his order, stated:

> "There remain to be considered defendants' motions to dissolve the injunction heretofore issued and to dis-

[1] Avco Corporation v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al. (April 8, 1968) ... U.S. ...; ... L.E. 2d ...; 36 U.S. L. Week 4288, footnote 4.

> miss the action. *On the basis of the court's reasoning and the authorities cited in connection with the motion to remand, the court is of the opinion that the motion to dissolve the injunction is well taken and that the motion to dismiss the action is not well taken.*
>
> "*Accordingly*, it is Ordered that the motion to dismiss the action is denied, *and it is further Ordered that the injunction heretofore issued be, and it hereby is, dissolved.*" (A. 22; emphasis added)

It will be observed that in the foregoing paragraph, the District Judge explicitly stated that he was dissolving the state court injunction on the basis of "the authorities cited in connection with the motion to remand." As shown above, two of the "authorities cited in connection with the motion to remand" were "*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962)" and "the Norris-LaGuardia Act." (A. 19). It is evident that these were the authorities to which the District Judge was referring, and which were the "basis" of his decision to dissolve the injunction, because they are the only authorities cited by him in connection with the motion to remand which could conceivably require dissolution of the injunction. The District Judge could not have been relying on the companion case of *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) in dissolving the state court injunction because *Atkinson* itself did not involve a prayer for injunctive relief. Neither did any of the other cases cited by the District Court in its order of March 2nd, excepting *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837; cert. den. 380 U.S. 935 (1965), referred to by the Court in footnote 1 and expressly rejected by the District Court as an authority. (A. 18) It must necessarily follow, therefore, that when the District Court stated that it was dissolving the state court injunction "on the basis of * * * the authorities cited in connection with the motion to remand," the reference was to *Sinclair* and

Norris-LaGuardia. The words "on the basis of" and "accordingly," employed by the District Court in this portion of its order, make it clear that the court was dissolving the state court injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*." [2]

The validity of the above conclusion is supported by the fact that the motion to dissolve filed by the Respondents was based solely and specifically on Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). In their motion, the Respondents claimed that under Section 4, the District Court was powerless to "issue" or "maintain" any injunction growing out of a labor dispute. The Respondents also claimed that the existing injunction issued by the Chancery Court of Tennessee was "illegal" under the provisions of Norris-LaGuardia. In its order of March 2nd, the District Court did not repudiate these grounds expressly relied on by the Respondents. Reading the order of March 2nd, together with the motion on which it was based, the conclusion that the District Court believed it was controlled in the action which it took by Norris-LaGuardia and *Sinclair* is inescapable.

2. It is respectfully submitted that the Court should not reserve decision on the scope and effect of *Sinclair* for an "appropriate future occasion," but should face and decide these important questions now in the instant case. Clearly, if the "scope" of *Sinclair* does not extend to state courts or removed cases, or if *Sinclair* no longer has "validity," this Petitioner has been the victim of prejudicial error through the rulings of the courts below which are the subject of this proceeding in the Supreme Court. The opinion of April 8th now surrounds *Sinclair* with a fog of uncertainty.

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[2] Avco Corporation v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al. (April 8, 1968 ... U.S. ...; ... L.E. 2d ...; 36 U.S. L. Week 4288, footnote 4.

There is little likelihood that a petition to review a state court injunction will ever reach the Supreme Court through any route other than removal. In view of *Avco*, unions hereafter will always remove rather than appeal the state court injunction order. So long as *Sinclair* is the law the District Court will act as the District Court acted in the instant case, and the Court of Appeals will affirm as the Court of Appeals did in the instant case. It is of urgent importance to the parties to collective agreements which contain no-strike clauses to dissipate the present fog of uncertainty and resolve these important questions at the earliest possible moment. It is respectfully submitted that the instant case does, in fact, present an appropriate vehicle for such decision of the fundamental question which the Court has reserved and, indeed, on its facts, requires such decision.

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CERTIFICATE OF COUNSEL

J. MACK SWIGERT, an attorney for the Petitioner in the above proceeding and a member of the Bar of this Court, hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay.

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SUPREME COURT OF THE UNITED STATES

No. 445.—October Term, 1967.

Avco Corporation, Petitioner, *v.* Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 8, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner filed a suit in a state court in Tennessee to enjoin respondent and their members and associates from striking at petitioner's plant. The heart of the complaint was a "no-strike" clause in the collective bargaining agreement by which "grievances" were to be settled amicably or by binding arbitration. The eligibility of employees for promotion engendered disputes—allegedly subject to the grievance procedure—which so far as appears involved no violence or trespass but which resulted in work stoppages and a walkout by employees. The state court issued an *ex parte* injunction.

Respondent then moved in the Federal District Court for removal of the case.[1] A motion to remand to the

[1] 28 U. S. C. § 1441, provides in relevant part:

"Actions removable generally

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . ."

state court was made and denied, the District Court ruling that the action was within its original jurisdiction. The District Court granted respondent's motion to dissolve the injunction issued by the Tennessee court. The Court of Appeals affirmed. 376 F. 2d 337. We granted the petition for certiorari (389 U. S. 819) because of an apparent conflict between the decision below and *American Dredging Co.* v. *Local 25,* 338 F. 2d 837, from the Third Circuit Court of Appeals.

The starting point is § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185, which, we held in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes. We stated:

> "We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." 353 U. S., at 456–457.

An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court.[2] *Humphrey* v. *Moore*, 375 U. S. 335; *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95; *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502. Removal is but one aspect[3] of "the primacy of the federal judiciary in deciding questions of federal law." See *England* v. *Medical Examiners*, 375 U. S. 411, 415–416.

It is thus clear that the claim under this collective agreement is one arising under the "laws of the United States" within the meaning of the removal statute, 28 U. S. C. § 1441 (b). It likewise seems clear that this suit is within the "original jurisdiction" of the District Court within the meaning of 28 U. S. C. § 1441 (a) and (b). It is true that the Court by a 5-to-3 decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, held that although a case was properly in the federal district court by reason of § 301, the Norris LaGuardia Act bars that court from issuing an injunction in the labor dispute. The nature of the relief available after jurdisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. The relief in § 301 cases varies—from specific performance of the promise to arbitrate (*Textile Workers Union* v. *Lin-*

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[2] We find it unnecessary to rule on the holding of the Court of Appeals below that "the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d, at 343. That conclusion would suggest that state courts are precluded by § 4 of the Norris-LaGuardia Act from issuing injunctions in labor disputes, even though the defendant does not exercise his right—which we confirm today—to remove the case to the District Court under 28 U. S. C. § 1441 (b), and the state court therefore retains jurisdiction over the action. We have no occasion to resolve that matter here, since respondent did elect to have the case removed.

[3] See Dobie, Federal Procedure, 346 (1928); Hart & Wechsler, The Federal Courts and the Federal System, 727–733, 1019–1020 (1953).

coln Mills, supra), to enforcement or annulment of an arbitration award (*United Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593), to an award of compensatory damages (*Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238), and the like. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 199–200. But the breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter. Any error in granting or designing relief "does not go to the jurisdiction of the court." *Swift & Co.* v. *United States*, 276 U. S. 311, 331. Cf. *Zwickler v. Koota*, 389 U. S. 241, 254–255. When the Court in *Sinclair Refining Co.* v. *Atkinson, supra*, at 215, said that dismissal of a count in the complaint asking for an injunction was correct "for lack of jurisdiction under the Norris-LaGuardia Act," it meant only that the Federal District Court lacked the general equity power to grant the particular relief.[4]

Title 28 U. S. C. § 1337 says that "The district courts shall have original jurisdiction of any civil action or proceeding under any Act of Congress regulating commerce . . . .". It is that original jurisdiction that a § 301 action invokes. *Textile Workers* v. *Lincoln Mills, supra*, at 457.

Affirmed.

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[4] Another question raised here is whether the District Court, to which the action had been removed, should have dissolved the injunction issued by the Tennessee state court. There is, of course, no question of the power of the District Court to dissolve the injunction. See 28 U. S. C. § 1450. Whether it did so because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, or because of its equity powers or both is not clear. But the Court of Appeals went much further and said in a dictum that "the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d, at 343. We reserve decision on those questions.

SUPREME COURT OF THE UNITED STATES

No. 445.—October Term, 1967.

Avco Corporation, Petitioner,
v.
Aero Lodge No. 735, International Association of Machinists and Aerospace Workers, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[April 8, 1968.]

Mr. Justice Stewart, with whom Mr. Justice Harlan and Mr. Justice Brennan join, concurring.

I agree that the case before us was removable to the Federal District Court under 28 U. S. C. § 1441.

The District Judge not only denied a motion to remand the case to the state court but also dissolved the state court injunction, and it is only by virtue of the latter order that an appeal was possible at this stage of the litigation. *American Dredging Co.* v. *Local 25,* 338 F. 2d 837, 838, n. 2.

As the Court says, it is not clear whether or not the District Judge dissolved the injunction "because it felt that action was required by *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195," *ante,* at —, n. 4. Accordingly, the Court expressly reserves decision on the effect of *Sinclair* in the circumstances presented by this case. The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future occasion.